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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1027

ROBERT WAVERLY HICKS, ET AL.,
Petitioners

v.

PHYSICAL THERAPISTS EXAMINING BOARD
FOR THE DISTRICT OF COLUMBIA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The three opinions of the District of Columbia Court of Appeals (APPENDICES A, B and C, *infra*, A 1-4, B 1-3 and C 1-3) are reported as follows: *Hicks v. Physical Therapists Examining Bd.*, 221 A.2d 712; *Schramm v. Physical Therapists Examining Bd.*, 219 A.2d 846; and *Hlebanja v. Physical Therapists Examining Bd.*, 219 A.2d 848. The judgment of the United States Court of Appeals for the District of Columbia Circuit (APPENDIX D, *infra*, D 1-3) dated June 16, 1967, is not reported, no opinion having been written. The order rejecting petition for rehearing *en banc* (APPENDIX E, *infra*, E-1) was entered on September 28, 1967.

JURISDICTION

The judgment of the court below here sought to be reviewed (APPENDIX D, *infra*, D 1-3) was entered on June 16, 1967; petition for rehearing *en banc* denied September 28, 1967. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Physical Therapists Examining Board for the District of Columbia should have set a standard for licensing physical therapists on "comparable training or experience", without examination, under the "grandfathers clause," pursuant to the mandate from Congress, contained in the Physical Therapists Practice Act.

2. Whether in denying the applications for registration as physical therapists without examination did the standard adopted by the respondent exceed the authority granted by Congress.

3. Whether it was error to apply a prejudicial standard in examining the petitioners' qualifications for registration as physical therapists "without examination."

4. Whether the petitioners' practice per se constituted physical therapy within the term of "comparable training or experience" as to entitled them to be registered as physical therapists "without examination" under the grandfathers clause.

5. Whether a finding by the respondent that petitioners were not graduates of approved schools a basis to deny their licenses when their applications for registration by waiver were predicated on "comparable training or experience".

6. Whether it was proper to make a finding of fact on an item not in issue as a basis to disqualify petitioners from registration as physical therapists within the meaning of the Physical Therapists Practice Act.

7. Whether the respondent was arbitrary and capricious in the conduct of the hearings thereby denying the petitioners fair and impartial hearings and due process of law.

STATUTES INVOLVED

The provisions of the Physical Therapists Practice Act, the Statute involved is Public Law 87-280 (D.C. Code Ann. § 2-451-472, Supp. V, 1966), are set forth in APPENDIX F, *infra*, (F 1-6).

STATEMENT

The severely abbreviated narrative that follows sets forth only sufficient facts to place in their setting the issues presented by this petition.

Petitioner Robert W. Hicks received formal education after graduation from high school consisting of Safety Administration, which covered fundamentals of physical ther-

apy at the School of Mines, University of West Virginia; he studied Medical Technology at Maryland Academy of Sciences, receiving a Bachelor of Science degree; he then studied Civil (Bio-Medical) Engineering at American International Academy, receiving a Bachelor of Science degree in Civil Engineering. Thereafter, he received a Master of Science degree in Physiology and Bio-Chemistry at the same institution. Simultaneously, he enrolled at George Washington University on a Pre-Medical curriculum.

In addition to this education, Mr. Hicks worked at various places in fields related and allied to physical therapy. While at the University of West Virginia, he worked with a mine rescue car, treating men crushed under slate in mine accidents. Later, he worked in the hospital under the medical staff at Johns Hopkins University Hospital doing urinalysis, blood chemistry and bacteriology on specimens from bed patients.

Thereafter, as a holder of a reserve officers commission and due to his prior medical training, Petitioner Hicks was assigned to the Corps of Engineers, United States Army, as "Safety Officer" with the Washington (D.C.) Engineer District. He was in charge of the Safety and Health Clinic Section for 5 years and 9 months, during World War II, Exhibit V, (JA 32-57).

Mr. Hicks was a Consultant on the modernization of the Physical Therapy Department of the U.S. Public Health Service, Medical Dispensary in Washington, D.C. He did physical therapy research under Dr. Paul Windel.

Petitioner Hicks was employed by the Veterans Administration for approximately 2-½ years as an Associate Engineer (Bio-Medical Engineering). He was a Consultant regarding the physiological comfort chart inhalation therapy effects on patients from an air conditioning, heating and ventilating standpoint in the various hospital operating and intensive care recovery rooms.

Mr. Hicks entered Dr. T. M. Schippell's Washington College of Physiotherapy where he completed a three-year

course in physical therapy, receiving a diploma. Following his completion of this study he remained at the school and served three years as a physical therapist in the modern physical therapy clinic maintained by the college (JA 58-62).

During the months of August, September and October, 1958, Petitioner Hicks, at the request of Mrs. Eleanor Roosevelt, toured 7 countries in Europe studying physical therapy and techniques for handling "birth defects" (JA 81-82). Upon his return from this European tour he wrote an extensive report for Mrs. Roosevelt, as a guide for the various Chapters of the National Foundation, "March of Dimes", in the use of prescribed physical therapy modalities with birth defect cases (JA 127 and JA 146-147).

Beginning in August 1956, Mr. Hicks opened his own private Physical Therapy Clinic in the District of Columbia. He has maintained such private practice continually to date.

Petitioner Leona E. Schramm, after graduation from high school, entered the field of physical therapy first at Banff Springs Hotel, Alberta, Canada, specializing in hydrotherapy, a branch of physical therapy. Miss Schramm also attended the Washington College of Physiotherapy and served in the physical therapy clinic.

In 1960, Miss Schramm entered private physical therapy practice in association with Mr. Hicks. During this time, Miss Schramm took various courses of study in areas required and related to physical therapy.

Petitioner Cecilia M. Hlebanja first began her training in physical therapy in the United States Naval Service on active duty. She served for a period of 27 months in various Naval Hospitals as a physical therapist, holding a rating as a Pharmacists Mate. She received an honorable discharge.

Her next training in physical therapy was at the Washington College of Physiotherapy. At that institution she studied physical therapy and worked in the physical therapy clinic. During this period and continuing until she entered private practice of physical therapy, Miss Hlebanja took various accredited college courses at American University, Maryland

University and George Washington University related to physical therapy.

In 1959, she entered into private practice of physical therapy with Mr. Hicks and Miss Schramm. This association has continued to date.

To keep abreast of the modern advancements in physical therapy, all three petitioners attended seminars at Johns Hopkins University Hospital, Physical Therapy Department, Mr. Hicks since 1956, and Miss Schramm and Miss Hlebanja since 1960. In addition, Petitioners Hicks and Schramm have attended seminars at U.S. Public Health Service Hospital in Baltimore.

In 1961, Congress passed the Physical Therapists Practice Act above referred to. The effective date of the Act was February 20, 1963. All physical therapists had to file their applications by February 20, 1964.

Petitioners, at the specific request of the Physical Therapists Examining Board, hereinafter called "Board", filed their Waiver Applications to be licensed under the "grandfathers clause" on September 16, 1963. These applications were on the basis of "comparable training or experience" without examination.

All three applications were summarily denied by the Board. These denials were mailed to the petitioners under date of September 20, 1963. From these denials, petitioners filed their petitions for review in the District of Columbia Court of Appeals. Upon the filing of these petitions, Corportation Counsel confessed error and requested that the cases be remanded to the Board for hearings. This was done by Court Order of October 25, 1963, Petitioner Hicks (JA 1), Schramm (JA 191), and Hlebanja (JA 235).

Thereafter, all three cases came on before the Board for public hearings on February 25, 1965. These continued the following day, at which time the hearings were terminated with the records left open for additional evidence and argument of counsel. Hearings were resumed and completed on April 9, 1965.

The Board gave its decisions on August 31, 1965, again denying licenses to all three petitioners.[1] From these decisions, the petitioners again filed their petitions for review in the District of Columbia Court of Appeals.

After filing briefs in all three cases, they were consolidated for hearing. That court affirmed the cases, by written opinions of Petitioners Schramm and Hlebanja on June 1, 1966. In timely fashion both petitioners filed motions for rehearings on June 9, 1966. These motions were denied on June 14, 1966.

Petitioners Schramm and Hlebanja then filed their petitions for allowance of appeal with the United States Court of Appeals for the District of Columbia Circuit. These petitions were filed on June 22, 1966. That court denied their appeals on August 19, 1966.

On July 14, 1966, the District of Columbia Court of Appeals, by written opinion, affirmed the decision of the Board in Mr. Hicks' case. On July 22, 1966, he also filed his petition for allowance of an appeal with the United States Court of Appeals for the District of Columbia Circuit. During this process, and with his reply brief, he caused to be filed "Appendix B, ...", hereinafter called "Appendix B" (JA 91-102).

Immediately thereafter that court, *sua sponte*, set aside the orders of August 19, 1966, denying the appeals of Petitioners Schramm and Hlebanja on August 26, 1966. On October 17, 1966, all three cases were consolidated and the appeals were allowed. After hearing these consolidated cases, that court affirmed the Board and the District of Columbia Court of Appeals, without opinion, by judgment dated June 16, 1967.

In timely manner the petitioners filed their petition for rehearing *en banc* on June 30, 1967. To this petition, respondent filed an answer. In timely fashion, the petitioners filed a reply on July 18, 1967, and a motion for

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[1] Hicks (JA 88-90), Schramm (JA 201-203) and Hlebanja (JA 244-246)

leave of court to have the same allowed. This motion was granted on September 28, 1967, directing the clerk to file petitioners' reply. The petition for rehearing *en banc* was denied by the court on September 28, 1967. Again, in timely manner, the petitioners did, on October 5, 1967, file a motion for clarification of the judgment. This motion was denied on October 26, 1967, (APPENDICES K and L, *infra*, K-1 and L-1).

REASONS FOR GRANTING THE WRIT

1. It Was Error Not To Establish Reasonable Standards To Inform the Petitioners of the Criteria To Be Met.

There are numerous Federal regulatory agencies controlling industry, trade, commerce, professions, labor and others. The process of these controls gave rise to the field of administrative law. The boards, agencies and commissions, created by the Congress, are quasi-legislative bodies. They derive this quasi-legislative power from the enabling acts passed by Congress. Also from the enabling legislation they derive quasi-judicial and quasi-executive power.

In passing these enabling acts, the Congress must establish a standard to be followed by the Board, Agency or Commission for the authority being delegated. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

In turn, the Boards, Agencies and Commissions should set standards for the particular categories of persons sought to be regulated. It is from these published standards that the regulated individuals must govern their conduct.

Regulatory standards are becoming more and more important. The principal concern, however, is the lack of standards. Instances of this lack have been expressed by the Food and Drug Administration's proposed Medical Device Safety Act; the suit by the automobile manufactures recently filed in the Sixth Circuit to compel the setting of automobile safety manufacturing standards; the automobile tire safety standards; and proposed pipeline safety standards in interstate commerce. The result of this lack of standards

has now reached a state of National importance and is a matter of public interest.

Once the Congress has set a standard for the delegation of authority to the Board, Agency or Commission, it is a lawful delegation of legislative power. It is the duty of the Board, Agency or Commission then to promulgate standards by which the regulated individuals can govern their conduct. It is the necessity for the establishment of these important standards for which there is a growing National concern of paramount importance.

The Boards, Agencies and Commissions have failed and refused to set standards except under the compulsion of orders of the courts. Those Boards, Agencies and Commissions which have or do set them, frequently set standards which are unreasonable, exceeding the statutory authority granted by the legislative power of Congress, and which have proven to be prejudicial standards.

It is recognized that an administrative agency cannot, in every instance, establish an applicable standard as guidelines for the regulation of the public. In these cases, the Board, Agency or Commission must proceed on a case by case basis. Such a procedure has been sanctioned by this Court. *Securities & Exchange Comm. v. Chenery Corp.*, 332 U.S. 194 (1947); *American Power & Light Co. v. Securities & Exchange Comm.*, 329 U.S. 90 (1946). It is submitted, however, that where there is a recurring situation applicable standards are not only desirable, but necessary. Without these standards, the conduct of business may be declared unlawful or the public denied the right to conduct a business or profession. In order to declare such transactions unlawful they must fall under the law of some standards of conduct prescribed by an agency of the Government authorized to prescribe such standards.

Such principles are also applicable to state and local government. Into these categories fall the statutes enacted by the Congress for the District of Columbia, a Federal City.

One such statute was the Physical Therapists Practice Act, enacted in 1961, Public Law 87-280, (APPENDIX F, *infra*,

F 1-6), (D.C. Code Ann. § 2-451-472). This Act authorized the Commissioners of the District of Columbia to establish a Physical Therapists Examining Board, the respondent here, referred to as "Board" hereinafter, to register, *inter alia*, all applicants qualified within the terms of the Act.

The Act specifies, in Section 9(1) and 9(2), two principal means of qualifications for registration: (1) by successfully passing a written examination, and (2) for those persons practicing physical therapy in the District of Columbia for two years prior to the effective date of the Act "without examination" by being a graduate of an approved school or by demonstrating "comparable training or experience".

The second provision is commonly referred to as a "grandfathers clause" in similar licensing statutes. This Court has recognized that the purpose of such clauses is to permit those persons who have been acceptably engaged in the profession for a number of years to continue to do so. It has been continually recognized by such legislation that those who have acceptably followed the profession for a specified minimum length of time may be assumed to have the qualifications which others are required to demonstrate by examination. See *Watson v. Maryland*, 218 U.S. 173 (1910).

In the present Act the Congress has specified two years as the length of time necessary for registration "without examination". In addition, to assure that the public is adequately protected, Congress has established an additional requirement – that the applicant be either a graduate of an approved school or that he demonstrate training or experience comparable to a graduate of an approved school. Thus there is a clear mandate from Congress that the Board shall register an applicant with training or experience comparable to that of a graduate of an approved school.

Here then, is an instance where a standard is most essential in promulgation of the statutory authority granted by Congress. The granting of a license to a professional practitioner of the healing arts on "comparable training or ex-

perience" is a recurring situation. Licensing of such professional practitioners under a grandfathers clause affects his or her livelihood and substantial property rights. The standard that such a practitioner must meet should be fully prescribed by the Board or the Commissioners to formulate the requirements to meet the intent and purpose of the statute as established by Congress.

The requirement that an administrative body be required to establish reasonable standards would have a far reaching effect. Standards have become a National issue of great magnitude affecting professions and industry, which have a great economic effect on the entire country. As a result, these standards have also become a matter of great public interest.

2. The Physical Therapists Examining Board Erred When It Denied Petitioners' Applications by Applying a Standard Which Exceeded the Authority Granted to It by Law.

When Congress passed the Physical Therapists Practice Act for the purpose of regulating the practice of physical therapy in the District of Columbia, it authorized the Commissioners of the District of Columbia to establish the Physical Therapists Examining Board. The Board, *inter alia*, is to register all applicants qualified within the terms of the Act.

As previously stated, there are two principal means of qualification for registration: (1) by successfully passing a written examination, and (2) for those persons practicing physical therapy in the District of Columbia for two years prior to the effective date of the Act "without examination" by being a graduate of an approved school or by demonstrating "comparable training or experience." It is clear that Congress intended that the Board register all applicants with training or experience comparable to that of a graduate of an approved school.

The Board has the authority to determine when an applicant possesses the qualifications to meet this standard. Thus, under the guise of defining "comparable training or experience" the Board has adopted "APPENDIX B, CRITERIA FOR MEETING REQUIREMENT OF PUBLIC LAW 87-280, SECTION 9, (2) 'RECEIVED COMPARABLE [TRAINING OR] . . . EXPERIENCE IN THE PRACTICE OF PHYSICAL THERAPY. . . .' " [hereinafter referred to as "Appendix B".] (JA 91-102).

While the Chairman, of the Physical Therapists Examining Board, has denied using Appendix B,[2] it is clear that the Board has consistently applied these criteria in the cases coming before it. In *Sherman v. Physical Therapists Examing Bd.*, 208 A.2d 728 (D.C. Ct. App. 1965), a case preceding the case at bar, the record, both during the hearing and on appeal conclusively indicates that this "Appendix B" was the standard applied.[3] Again, in the present case, the record shows that these criteria were used in questioning Petitioner Hicks during the hearing before the Board (JA 97 and JA 160-163).

Appendix B establishes criteria that greatly exceed the requirements for registration enacted by Congress. Appendix B also requires a minimum of 15 to 20 years experience before an applicant can be registered while Congress specified only that an applicant possess training or experience equivalent to a graduate of an approved school. Such graduates acquire, during their course of study, approximately 49 weeks of training and experience.[4] Yet "Appendix B" would sug-

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[2] Affidavit of Clara M. Arrington, Chairman, Physical Therapists Examining Board, attached to Supplemental Statement filed by respondent September 2, 1966 (JA 104).

[3] See transcript of *Sherman v. Physical Therapists Examining Bd.* cited in Answer to Supplemental Statement filed by petitioner on September 7, 1966, APPENDIX M, (M 1-3). On appeal of that case the sole exhibit filed by the Board was "Appendix B." *Ibid.*

[4] See Curriculum of the School of Physical Therapy, Medical College of Virginia (1964-1966); The Army Physical Therapy Course

gest that the experience of one not a graduate of an approved school would have to be at least 750-1000 weeks to be the equivalent – a clearly unreasonable comparison.

Furthermore, under the Act merely being a graduate of an approved school entitles an applicant to registration without examination[5] (D.C. Code Ann. § 2-458 (Supp. V, 1966)). Thus, Congress has assumed that a physical therapist who is a graduate of an approved school possesses the minimum standards of competency which guarantee the public safe performance. It is difficult to believe that it would require as much as 750-1000 weeks of training or experience to be comparable to this standard of safety. It hardly seems possible that even 49 weeks of training in an approved school would be equivalent to 750-1000 weeks of experience.

In addition to requiring an unreasonable length of experience "Appendix B" limits any consideration of an applicant's experience until the applicant has shown that he has received training under a supervisor who possesses the detailed background and qualifications specified by this "Appendix B," including graduation from an approved school. As stated in the Act, however, an applicant may qualify by showing either comparable training or experience.

Further, the Board has added an additional requirement as a requisite to consideration of an applicant's experience that has absolutely no basis in the enabling legislation. Under the criteria of "Appendix B" all of an applicant's experience must have been acquired in the course of employment. There is not a single word in the Act[6] which so limits the

(description of Army requirements); Organization Guide for Physical Therapy Schools, American Physical Therapy Association (1963) (list of essentials for acceptable schools of physical therapy).

[5]Of course, such an applicant must have practiced the requisite two years prior to the effective date of the Act in the District of Columbia.

[6]APPENDIX F, (F 1-6), Physical Therapists Practice Act, Public Law 87-280.

consideration of an applicant's experience. The Act merely requires that an applicant's experience be comparable to that of a graduate from an approved school. Rarely, if ever, will such a graduate have obtained his training in the course of employment.

Thus it is evident that in many particulars the requirements of Appendix B exceed the delegated authority of the Board. Training or experience required by the Act need only be comparable to that of an approved school—"comparable," not "identical." In speaking of the sufficiency of the enabling legislation by Congress, this Court in *American Power & Light Co. v. Securities & Exchange Comm., supra,* said, at page 105,

> . . . it becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which it is to apply, and the boundaries of this delegated authority. (Emphasis added.)

Certainly the requirements that Congress imposed were intended to be far more reasonable than the severe criteria set forth in "Appendix B." This becomes even more apparent when the Congressional standard, "comparable training or experience," is viewed in the light of the purpose of a "grandfather's clause",[7] of which it is a part. This is, that those who have acceptably practiced the profession for a given number of years possess the requisite qualifications and should not be legislated out of business. For the above reasons, the only possible conclusion is that the Physical Therapists Examining Board for the District of Columbia erred when it denied the applications in this case; the prej-

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[7] In *Brewster v. Kinlein,* 209 A.2d 788 (D.C. Ct. App. 1965) the court said:

> Licensing statutes, while primarily designed to protect the public, should be construed and administered in such a way that capable and deserving applicants, possessing requisite character qualifications, are not denied the right to gain or to continue a livelihood in the practice of their calling.

See: *Goldsmith v. Clabaugh,* 55 App. D.C. 346, 6 F.2d 94 (1925).

udicial standard "Appendix B", it applies far exceeded the authority granted this Board by Congress.

3. The Board Erred in the Use of a Prejudicial Standard for Examination of Petitioners.

The adoption of "Appendix B" has been denied by the respondent[8] however, an examination of the record gainsays this assertion (JA 160). At least one prior case establishes the use and adoption of this criteria.[9]

Although, the Chairman, of the Physical Therapists Examining Board, has further denied the use of Appendix B as a criteria in the examination of the Petitioners[10] the record clearly indicates its use in the examination of Petitioner Hicks. Page 4 of Appendix B (JA 94) sets forth the requirements for general hospital work. The Chairman of the Board examined petitioner concerning his experience in a general hospital (JA 159).

The criteria includes the number of calendar years for acceptable time in orthopedic hospitals and pediatric hospitals on page 5 (JA 95); and tuberculosis hospitals, psychiatric hospitals and nursing homes on page 6 (JA 96). Questions relating to his experience in such hospitals were propounded to him (JA 159).

Appendix B, Part III, page 7 (JA 97), sets forth in minute and specific detail the use of certain equipment and the treatment of certain conditions (including practically every conceivable lesion and disease known to man).[11] Pe-

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[8] Affidavits of F. E. Ropshaw and Clara M. Arrington, attached to Supplemental Statement filed by respondent on September 2, 1966. (JA 103 and JA 104).

[9] See excerpt from transcript in *Sherman v. Physical Therapists Examining Bd.*, *supra*, hereunto annexed as APPENDIX M, (M 1-3).

[10] Affidavit of Clara M. Arrington, *Ibid*, (JA 104).

[11] THE CHAIRMAN: Have you been instructed to answer all the questions on page 7 of Appendix "B", Roman Numeral III? (JA 160). [Emphasis added].

titioner Hicks was examined concerning these. This examination started when the Chairman asked the following question:

> "THE CHAIRMAN: Have you been instructed to answer all the questions on page 7 of Appendix "B", Roman Numeral III?"

This extensive list of lesions and diseases was the basis for the questioning of the petitioners. A critical comparison of the questions asked, particularly of Petitioner Hicks, and the conditions listed on page 7 reveal a definite pattern of questioning from Appendix "B." This pattern is revealed by the following table giving a line-by-line comparison as follows:

"APPENDIX B, CRITERIA"

(Roman Numeral III)

- page 7 -

LESIONS AND DISEASES - QUESTIONS

Line

1 – amputees (amputation), JA 159.

3 – asthma, JA 160.

6 – cerebral vascular accident (stroke cases), JA 153.

7 – deformities (birth defects), JA 146.

8 – palsy (brain lesions), JA 158.

9 – slipped disk (herniated nucleus pulposus), JA 154.

10 – multiple sclerosis, JA 149.

11 – neurologic disabilities (psychiatry, emotional), JA 141.

11 – muscular dystrophies, JA 149.

12 – orthopedic (conditions), JA 149.

13 – pre and post surgery (conditions), JA 141.

13 – peripheral nerve injuries (diseases), JA 158.

14 – polio (poliomyelitis), JA 141.

Continuing on pages 8, 9, 10 and 11 of Appendix B (JA 98-101), Petitioner Hicks was examined by the Board on "UTILIZING EQUIPMENT, DEVICES, TECHNICS", as follows: therapeutic massage, whirlpool baths, steam baths, electrotherapy, paraffin baths and foot therapy whirlpool (hydro-therapy) (JA 142 and JA 150-151), short wave diathermy, sinusoidal, surging sine wave, heat therapy, spot quartz lamp, infra-red rays and sunlamp (ultra violet) (JA 143), colonic therapy (JA 143 and JA 147-148), electrical testing of muscles (JA 143-144), reaction of degeneration (JA 144-145), braces for children (JA 145-146), pneumatic pressure devices, reverse isolation techniques, strength duration tests, coordination tests and sweat tests (JA 149), activities of daily living (stroke cases) JA 153-154) and [R. 35-36], manual muscle tests of the hand, leg, back and joint action (JA 145 and JA 157), grading muscles (range of motion) and muscle re-education (JA 157), gait functional training (JA 157-158), and ultra sound (JA 159). Petitioner Hicks was also asked about the methods of keeping clinical "Physical Therapy Patients' Records" (JA 151-152), as set forth on page 11 of Appendix B (JA 101).

Similar examination, based upon "Appendix B," was used in the cases of Petitioners Schramm and Hlebanja, although in neither was it as lengthy nor as vigorous.

Petitioner Hicks' training and practical experience of a diversified nature in the applications and principles involved in the field of physical therapy extends over a period of 20 years, Petitioner Schramm's 15 years, and Petitioner Hlebanja's 10 years. Such experience is certainly comparable to an academic course on the subject. It was wrong and unrealistic to apply such criteria as was used by the Board, namely: "Appendix B" and deny the applications.[12] *Sherman v. Physical Therapists Examining Bd., supra.*[13]

[12]The requirements of the sister states, Maryland and Virginia, are more realistic, being defined by law. See MARYLAND ANN. CODE, Art. 43, § 610; CODE OF VIRGINIA (1950), Title 54, §§ 308.5 and 310.].

[13]It should be noted that in this case the Board was composed of the same three members as in the instant cases.

4. The Board Erred in Its Findings of Fact Five, That the Practice the Petitioners Engaged in Was "Not the Practice of Physical Therapy".

The Board found that petitioners had engaged only in foot therapy, massage, steam baths and colonic therapy, which the Board did not "consider to be the practice of physical therapy".[14] Assuming arguendo that these were the only activities engaged in by the petitioners, they must be considered to be within the realm of physical therapy.

THE AMERICAN ILLUSTRATED MEDICAL DICTIONARY, (Dorland, Seventeenth Edition), p. 1396, defines "physical therapy" as:

> . . . the treatment of disease by physical (nonmedical) means, such as heat, massage, hydrotherapy, exercise, rest, occupation therapy, radiation, and electricity.

"Physical therapy" is defined in D.C. CODE ANN. § 2-451(c) (Supp. V, 1966) as:

> . . . the treatment of human disability, injury, or disease by supervised therapeutic procedures embracing the specific scientific application of physical measures to secure the functional rehabilitation of the human body.

The American Physical Therapy Association has defined "physical therapy" in the following manner:

> Physical Therapy is the treatment of patients with disabilities resulting from disease or injury by the use of therapeutic properties of exercise, heat, cold, water, light, electricity, sound and massage. Physical therapy may provide a patient with relief from pain. It may be the means of the patient's developing better coordination or of his learning to walk with crutches or an artificial leg.

The D.C. Code requires only "scientific application of physical measures" to constitute physical therapy. Thus assum-

[14] Hicks (JA 88-90), Schramm (JA 201-203) and Hlebanja (JA 244-246).

ing the petitioners engaged only in (1) foot therapy[15] (2) steam baths[16] (3) massage,[17] and (4) colonic therapy[18], as cited by the Board, their scientific application of these procedures bring them within the provisions of the Act.[19]

However, the record discloses that Petitioner Hicks testified on both direct and cross-examination to his extensive and varied experience with physical therapy techniques and treatment of ailments. The undisputed evidence showed that the petitioner's experience included treatment of patients under supervision and prescription from medical doc-

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[15] Foot Therapy: Treatment for functional disorders of the foot. (Medical Textbook by Frank D. Dickson, M.D., and Rex L. Diveley, M.D., Third Edition, 1953).

[16] Steam Bath: Vapor bath used in the treatment for relief from muscular spasm, chronic rheumatic diseases and arthritis. (Textbook on Hydrotherapy by: H. J. Behrend, M.D., Gertrude Brentano Finnerty, R.P.T., B.A., and Theodore Corbitt, R.P.T., B.Sc., M.A.).

[17] Massage: This is recognized as an essential for an acceptable school of physical therapy by the Council on Medical Education and Hospitals of the American Medical Association (Essentials of an Acceptable School of Physical Therapy, American Medical Association, 1955).

That even the Chairman recognizes "massage" as physical therapy is obvious from her cross-examination (JA 219). It is also noted that page 8, "Appendix B" recognizes massage as physical therapy (JA 98); listed thereon the various massage stroke technics testified to by Petitioner Schramm on cross-examination (JA 219).

[18] Colonic Therapy: Uses of water in medicine – preparation of patient for operation involving the intestinal tract, or diagnostic examination for clarity of x-ray pictures of the bladder and colon. (Textbook on Hydrotherapy by: H. J. Behrend, M.D., Gertrude Brentano Finnerty, R.P.T., B.A., and Theodore Corbitt, R.P.T., B.Sc., M.A.)

[19] It should be noted that all treatments given by the petitioners to patients were pursuant to a prescription from a medical doctor.

tors which included a large variety of ailments by prescribed physical therapy modalities. In addition to the findings of the Board, the evidence included the following:

Ailments treated – psychiatry [neurologic disabilities] emotional, polio (poliomyelitis) and pre and post surgery relative to physical therapy (JA 141), birth defects (JA 146), orthopedics, multiple sclerosis, muscular dystrophy and muscular myasthenia-gravis (JA 149), stroke cases (cerebral vascular accident) (JA 153), slipped disk (herniated nucleus pulposus) and sciatic nerve (neuritis) JA 154), peripheral nerve injuries, cerebral palsy (brain lesions) and axillary (armpit) nerve injury (JA 158), amputees (JA 159) and asthmatics (JA 160).

Techniques used – crutch walking (measurement check out) and bell bars (JA 141), whirlpool baths, electrotherapy, hydrotherapy and paraffin baths (JA 142), short wave diathermy, sinusoidal surging sine wave, heat therapy, spot quartz lamp, infra-red rays and sunlamp (ultra violet) (JA 143), electrical testing of muscles (JA 143-144), reaction of degeneration (JA 144-145), braces for children (JA 145-146), pneumatic pressure devices, reverse isolation techniques, strength duration tests, coordination tests and sweat tests (JA 149), activities of daily living (stroke cases) (JA 153-154) and [R. 35-36], manual muscle tests of the hand, leg, back and joint action (JA 145 and JA 157), grading muscles (range of motion) and muscle re-education (JA 157), gait functional training (JA 157-158), and ultra sound (JA 159).

Further, with respect to Petitioner Schramm, the record discloses that she testified on both direct and cross-examination to her experience with physical therapy techniques and treatment of ailments. The undisputed evidence showed this petitioner's experience also included the following:

Ailments Treated – low back pains, shoulder pains, arthritis, fractures, sprains, strains, bursitis, stroke (cerebral vascular accident) and polio (poliomyelitis) cases (JA 208-209), hip injuries, whiplashes, joint diseases and rheumatoid arthritis (JA 224).

Techniques used – paraffin baths, whirlpool baths, infra-red rays, short wave diathermy (JA 207), hydrocollator packs and exercise (JA 208), needle shower (JA 214), exercise gait walking, activities of daily living (JA 219-220), step walking, appliances or support devices – braces and bandages (JA 220), and sterilization as applied to physical therapy (JA 221-222).

And, finally, in the case of Petitioner Hlebanja, the record discloses that she testified on both direct and cross-examination to her experience with physical therapy techniques and treatment of ailments. The undisputed evidence shows this petitioner's experience also included the following:

Ailments treated – arthritis, back pains and fractures (JA 252), stroke cases – bedridden for a long time (home and hospital calls) (JA 260-261 and JA 263), paralytics (JA 263), and amputees (JA 263).

Technique used – paraffin baths, whirlpool baths, spray baths and contrast baths (JA 250 and JA 253), needle spray showers, hydrocollators, infra-red rays, short wave diathermy, sinusoidal surging sine waves – used for electrical stimulation (JA 253 and JA 261), galvanic and faradic electrotherapy treatments, test procedures, activities of daily living (JA 261-262), exercise techniques, parallel bars, step walking, pulling, bandages and compresses (JA 262), and postural training with patients (JA 263).

The petitioners have been issued, in connection with their private practice and Physical Therapy Clinic, current "Professional" Business Licenses and designated as "Physical Therapists", by the Government of the District of Columbia.[20] These Professional Business Licenses which have been issued to petitioners since 1960 can be considered as possessing a "property right", under Common Law. There-

[20] Hicks Exhibit A (JA 12 and JA 106); Schramm Exhibit A (JA 199, JA 206 and [Record 50]); Hlebanja Exhibit A (JA 242 and JA 253).

fore, petitioners should not be legislated out of business and which was not the intent and purpose of Congress. Specialized equipment in their modern professional Physical Therapy Clinic is shown in the photographs.[21]

All three of the petitioners carry, as an individual "Physical Therapist", malpractice insurance for physicians, surgeons and dentists – professional liability.[22]

The Board has exceeded its discretion in disregarding the substantial testimony of petitioners. In a similar case the District of Columbia Court of Appeals has stated that although an applicant does not have all the refined skills or specialized knowledge others may boast, that is not reason enough to say that he has no professional standing. *Sherman v. Physical Therapists Examining Bd., supra.*

5. The Board Erred in Denying Petitioners' Licenses on the Findings of Fact That They Were Not Graduates of an Approved School.

Section 2-458 of the D.C. Code provides for registration as a physical therapist, without examination, any person who has graduated from an approved school, or has had comparable training or experience. (Emphasis added.) Thus there are two ways to qualify without examination. It was petitioners' desire to qualify by showing "comparable training or experience," not by establishing graduation from an approved school. Petitioners introduced evidence showing their extensive and varied training and experience in the physical therapy field. However, the Board, in giving its reasons for denying petitioners' applications, stated that petitioners "have not submitted . . . satisfactory proof that they have . . . graduated from an approved school of physical therapy listed in the register of approved

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[21] Exhibits B through N, (JA 13-26, JA 117-119 and [Record 30-44]).

[22] Hicks (JA 120, JA 151 and JA 155); Schramm (JA 210) and Hlebanja (JA 255-257).

schools . . ."[23] In the case of Petitioner Hicks, the lower court found this prejudicial, but failed to reverse.[24]

Petitioners make no claim of having graduated from an "approved" school listed on the "register of approved schools". It was error to limit consideration of petitioners' experience to this point and to rely upon such a finding of fact as a basis for denying petitioners' applications for licenses.

6. The Board Erred in Its Findings of Fact Five Basing Its Decision on an Item Not in Issue, That Petitioners Had Not Practiced Physical Therapy in the District of Columbia for Two Years Preceding the Act.

The findings of the Board that the petitioners had not practiced physical therapy in the District of Columbia for two years immediately preceding the effective date of the Act is error. The order of public hearing did not make it an issue,[25] and, in fact, the Board had previously found that petitioners had satisfied this requirement. This was a part of the investigation done by the Department of Occupations and Professions for the Government of the District of Columbia, through their investigative staff at the request of the Board. The results of these investigations were recorded on the "Work Sheets for Checking Applications" of the Board.[26] These were made a part of each

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[23]The Waiver Application on its face states it will not be accepted unless accompanied by "Proof of graduation from a school of physical therapy" (JA 192 and JA 236).

[24]APPENDIX A, (A 1-4), Opinion-District of Columbia Court of Appeals.

[25]Hicks (JA 10-11), Schramm (JA 197-198) and Hlebanja (JA 240-241).

[26]Hicks (JA 9), Schramm (JA 196) and Hlebanja (JA 239).

petitioner's record by Court Order dated December 15, 1965.[27]

Although not required, further, the record in this case establishes prima facie that they had practiced for the requisite period. The evidence showed that Mr. Hicks served from 1953 to 1956 in Dr. Schippell's modern physiotherapy clinic.[28] In August, 1956, he opened his own Physical Therapy Clinic at 1809 H Street, N.W., in the District of Columbia, and operated at that location until the end of 1959. In 1960, Mr. Hicks acquired a financial interest in the building located at 1920 Eye Street, N.W., moving his Physical Therapy Clinic there. Here, Mr. Hicks also became associated in business with Miss Schramm and Miss Hlebanja. They have continued to be actively engaged in the practice of physical therapy in the District of Columbia to the present time.[29] This testimony has remained uncontradicted. Further, the witness, James R. Morton, testified that he was given physical therapy treatments during this period.[30] The only witness testifying on behalf of the Board, the Executive Secretary, Hope H. McIntyre, produced no evidence nor offered any testimony refuting the petitioners' evidence.

A prima facie case must always prevail in the absence of countervailing proof. *Wright v. Peabody Coal Co.*, 225 Ind. 679, 77 N.E.2d 116 (1948). In addition, the courts have consistently held that a finding of fact must be supported by the evidence. *Mississippi River Fuel Corp. v. FPC*, 82 U.S. App. D.C. 208, 163 F.2d 433 (1947). Thus the Board's finding is contrary to the weight of the evidence.

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[27] District of Columbia Court of Appeals, Court Order (JA 8).

[28] Affidavit, Exhibit W (JA 58-62).

[29] JA 126-127 and JA 142.

[30] JA 164-169 and [R. 138-153], and see: APPENDIX G, (G-1).

7. The Board's Actions Were Arbitrary and Capricious in That They Did Not Afford the Petitioners a Fair and Impartial Hearing.

Petitioners submitted their Waiver Applications for registration "without examination" to the Board on September 16, 1963. Registration was refused in summary fashion without a hearing in each case,[31] and they were so advised by letters dated September 20, 1963.[32] Upon a petition for review the District of Columbia Court of Appeals remanded the same for a hearing in accordance with recognized procedure. Pursuant to the Court's Order hearings were ultimately held on February 25-26, 1965. However, the Board treated the hearings as hearings on the denial of petitioners' applications[33] contrary to the remand Order of the Court, which called for an initial hearing into petitioners' "comparable training or experience".[34] Thus it was the Board's position throughout the hearings that the petitioners were not qualified.[35] The effect of this position was to place upon

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[31] After denial, the applications were initialed by only one member of the Board (Hicks, R. 8-A [Exhibits (right) 1 and 2], 1st appeal filed October 16, 1963); thereafter, and upon remand of the case the other Board members initialed the applications and dated the same September 20, 1963. This occurred in all cases, however, the record in the in the cases of Schramm and Hlebanja are still on file in the District of Columbia Court of Appeals. Note reverse side of Applications (JA 226).

[32] Hicks (JA 4-5), Schramm (JA 194-195) and Hlebanja (JA 238).

[33] Hicks (JA 105), Schramm (JA 203) and Hlebanja (JA 246).

[34] This position is reiterated in the Board's Orders of August 31, 1965, in the language "hearing on the disapproval of the said application. . . ." Hicks (JA 88-90), Schramm (JA 201-203, and Hlebanja (JA 244-246).

[35] It should be noted that the Board's only witness, the Executive Secretary, testified that no one not a graduate of an "approved

them the higher burden of overcoming the Board's negative finding, in effect asking the Board to reverse its position, rather than merely showing that they had "comparable training or experience". To be valid a hearing must be fair and impartial. As stated in 2 AM. JUR.2d, *Administrative Law*, § 412 (1962), this proposition is that:

> A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open and impartial, and if such a hearing has been denied, the administrative action is void. The right to such a hearing is an inexorable safeguard and one of the rudiments of fair play assured as a minimal requirement by the Fourteenth and Fifth Amendments . . . there can be no compromise on the footing of convenience or expediency, or because of the natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.

The entire record is fraught with incidences of prejudicial conduct on the part of the Board. After direct examination of petitioners was completed, they were cross-examined by the Assistant Corporation Counsel.[36] After he completed his cross-examination, all the members of the Board directed questions to them which amounted to

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school" had been admitted "without examination" (JA 174-175). This may be further indication of the Board's arbitrary and capricious action and predetermined position. It should also be noted that inquiry made to the Department of Occupations and Professions revealed by letter dated February 8, 1967, that 53 applicants were registered under Section 9 (1), and only one on "comparable training or experience," Ruth Sherman. This information was conveyed to the District of Columbia Court of Appeals by letter dated February 8, 1967. See: (Petition for Rehearing *En Banc*, App. 8 and 9). Thereafter, John F. Hansen was registered (*Hansen v. Physical Therapists Examining Bd.*, 228 A.2d 497 (D.C. Ct. App. 1967) by Court Order, as was Ruth Sherman (1965).

[36] Hicks (JA 128-136 and [R. 61-82]); Schramm (JA 210-212, JA 224-225 and [R. 15-23]); Hlebanja (JA 254-255 and [R. 19-23]).

cross-examination.[37] At this point it became manifest that the Board was not acting as a fair and impartial fact finding tribunal, but was acting as an advocate seeking reason to reaffirm the position previously taken.[38]

In the course of the Board's cross-examination of Petitioner Hicks, an oral examination was attempted contrary to the expressed provisions of the statute. The Board persisted in its attempt to conduct an oral examination, despite the objections of Counsel, all of which were overruled (JA 144-145):

> "THE CHAIRMAN: Could you tell us what a reaction of degeneration is?
>
> "MR. HARRISON: Madam Chairman, I am afraid we are going to have to object to that question and any similar questions which go to the equivalent of an examination because we are here proceeding under Section 2-458 – "registration without examination" and if you will indulge me for just a moment, let me invite your attention to the first clause of the first sentence of that section which reads – and I quote 'The Commissioners shall register as a physical therapist without examination.'"
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> * * *
>
> "THE CHAIRMAN: Objection overruled.
>
> "MR. HARRISON: I advise my client not to answer this question or any similar question regardless of the question being overruled.
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> * * *

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[37] The questioning by the Board was very extensive, comprising 52 pages of the Record in Petitioner Hicks' case (JA 136-163 and [R. 82-133]); 26 pages in Petitioner Schramm case (JA 212-224 and [R. 23-48]); and 20 pages in Petitioner Hlebanja (JA 255-263 and [R. 23-42]).

[38] Further evidenced by the refusal of the Board to refer to Petitioner Hicks' instructor, Dr. Paul Windel, by his title.

"THE CHAIRMAN: Your objections are overruled. We will ask questions in order to determine comparable training.

"MR. HARRISON: If Madam Chairman wishes to ask them, we will be glad to indulge her by listening to the questions, but to the extent that they fall within the purview of our objection, we are going to have to instruct our client – and Mr. Hammer has so instructed him – not to answer them."

The asking of these basic questions, concerning physical therapy and as to the technical procedures involved therein, was itself an oral substantive examination. Thus, the Board's decision nullified the very purpose of the hearing which was to determine whether Petitioner Hicks' training and experience entitled him to registration without examination.

The lower court has held in a similar case that the petitioner is exempt from this type of an examination. *Sherman v. Physical Therapists Examining Bd., supra.* Thus, the Board's questioning of Petitioner Hicks was not an attempt to ascertain "comparable training or experience", but took on the substance of an oral examination. The Board in attempting to give this oral examination was again seeking a reason to deny the petitioner's application. Although thwarted by Counsel's objections from asking some of these questions, the Board definitely stipulated that all of the questions on their list would appear in the record.[39] Subsequently, the lower court in deciding the *Sherman* case, made it clear that such an oral examination was improper. Thus the Board was aware that it was clearly in error in attempting to give an oral examination and either failed or refused to include the improper questions from their list in the record, contrary to the stipulation.

The Board refused to accept exhibits offered by petitioners to show comparable training or experience extend-

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[39] Board's omission, "list of questions", according to record stipulation (JA 150).

ing over a long period, and erroneously limited it to the two years prior to the effective date of the Physical Therapists Practice Act, despite the clear distinction in this Act between the "grandfather's clause" exception and the "comparable training or experience" requirement. This Board refused Petitioner Hicks' exhibits which were before and after the two-year period. All petitioners could have presented many more such exhibits, but did not do so because of the prior objections that had been sustained by the Board (JA 126).

In addition to refusing pertinent evidence because it was not during the two-year period, the Board refused evidence reflecting training or experience also during the two-year period. This was the testimony of Mrs. Clifford J. Batson, a patient of Petitioner Hicks. She was being treated during the grandfathers clause period between February 20, 1961 and February 20, 1963.[40]

Further examples of the Board's arbitrary position exist in its handling of exhibits. Not only did the Board pick and choose those portions of Petitioner Hicks' exhibits that it would accept, and thereby, in turn, separating the Duryee affidavit statement apart from the "several photographs" . . . "attached thereto", and made a part thereof and which were referred to in the affidavit, without even seeing them, but did so on its own motion without objection from the Assistant Corporation Counsel.[41]

On the other hand, with respect to all the Petitioners, the Board capriciously went out of its way to admit Government's exhibits – for example, such as Government Exhibit No. 6 in the Hicks' case, likewise, Government Exhibit No. 6 in the Schramm case, as well as, Government Exhibit No. 4 in the Hlebanja case. These were all un-

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[40] JA 163-164 and [R. 136-138].

[41] Duryee, Affidavit, Exhibit V (JA 32-57 and JA 176-179 [R. 180-186]).

signed, undated, unverified form letters entitled "proof of practice" and without probative value. These form letters allegedly from the office of Dr. William J. Tobin were admitted over the strenuous objection of Counsel[42] is plain hearsay and which letters were error to admit.

Such admission is predjudicial to the Petitioners since the Board accepted these form letters as "proof of practice". The Board apparently relied on these letters as proof that the Petitioners had not practiced physical therapy. All treatments rendered by Petitioners were under the supervision of Dr. Tobin and were corroborated by the witness, James R. Morton (JA 164-169 and [R. 138-153]). In *Technical Radio Laboratory v. Federal Radio Comm.*, 59 App. D.C. 125, 36 F.2d 111, 66 A.L.R. 1355 (1929), it was held that unverified statements of persons not called as witnesses were not properly admitted. Thus, it was clearly error on the part of the Board to admit the Dr. Tobin letters.

Further, evidence in rebuttal submitted at the time of the hearing were two letters – one dated December 31, 1964, as Government Exhibit No. 4 in the Hicks' case, likewise, as Government Exhibit No. 4 in the Schramm case, and, as well as, Government Exhibit No. 2 in the Hlebanja case. This letter states that none of the petitioners were employed by the Sibley Memorial Hospital. Further, Government Exhibit No. 5 in the Hicks' case, as Government Exhibit No. 5 in the Schramm case, and as Government Exhibit No. 3 in the Hlebanja case – this second letter dated March 22, 1965, states that the hospital "never kept records of private physical therapists giving treatment at Sibley Memorial Hospital".[43] Petitioners

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[42] Hicks' case, Government Exhibit No. 6 (JA 85 and JA 181-183 and [R. 197-202]); Schramm case, Government Exhibit No. 6 (JA 200-A); and Hlebanja case, Government Exhibit No. 4 (JA 243).

[43] Exhibit X (JA 63-68), Sibley Memorial Hospital Nurses' Notes, in opposition to Government's letters (JA 83 and JA 84), pertaining

never claimed they were employed by Sibley Memorial Hospital as they responded only to hospital calls upon medical doctor's orders "on a private basis". See: Nurses' Notes, Exhibit X (JA 63-68), from the patient's charts covering Petitioners' treatment rendered in the hospital, as well as, letters (JA 83 and JA 84).

Further, all of these letters – the Dr. Tobin form letter and the two letters from Sibley Memorial Hospital relative to Petitioners – do not establish any positive facts since they are without probative value, and their negative inferences cannot outweigh the substantial positive evidence of the Petitioners. A prima facie case is not overcome by evidence which merely affords bare conjecture. *Oates v. Continental Insurance Co.*, 137 W. Va. 501, 72 S.E.2d 886 (1952).

Again, upon an examination of the record, it discloses the existence in the Hicks' case of one further letter, which the Board included in the record and which this Board may have relied on in reaching its decision.[44] However, this Graham letter "First Endorsement dated 4/14/65" (JA 87) indicates on its face that it was received after the conclusion of the hearing on April 9, 1965. Thus, Counsel had no opportunity whatsoever to examine it or offer any explanation. In *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93 (1913), the Supreme Court said:

> In such cases the Commissioners cannot act upon their own information. . . . All parties must be fully appraised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.

[redacted]

to Government's Exhibits – Hicks' case No. 4 and No. 5; Schramm case also as No. 4 and No. 5, and, as well as, Hlebanja case No. 2 and No. 3 and (JA 180-181) and [R. 191-194]).

[44] JA 86-87 [indicates Record, pp. 247 and 249].

Another example is the arbitrary and conniving tactics resorted to by the Chairman of the Board in adding to the record the qualifying statement that Petitioner Hlebanja's Exhibit A (JA 242) was received only as a permit to conduct a business or as a tax receipt, without legal justification, even though such was never stated at the hearing, when the Chairman certified the then tainted record as "a true and accurate account of the hearing", to the District of Columbia Court of Appeals (JA 253 and [R. 19]).

It should be noted that the Board's only witness, the Executive Secretary, presented no evidence rebutting a prima facie case made out by Petitioners, which this Board could not ignore. The Board further chose to ignore substantial evidence of Petitioners' competence in physical therapy – for example, being the recommendation letter from Robert W. Mance, M.D.[45]

The Board was further arbitrary and capricious in not finding that Petitioner Hicks' extensive and varied training and practical experience involved in the diversified field of physical therapy which extends over a 20-year period, as likewise, Petitioner Schramm's 15 years, and, as well as, Petitioner Hlebanja's 10 years, as "comparable" to what they would have received in a two-year academic course at an approved school of physical therapy.

The lower court – District of Columbia Court of Appeals – said in *Sherman v. Physical Therapists Examining Bd.*, 208 A.2d 728 (D.C. Ct. App. 1965):

> ". . . the Board was wrong in refusing to recognize her long years of training and experience as required by the statute. . . It is wrong and unrealistic to say that more than 27 years of varied and extensive training and experience . . . was not comparable to an academic course on the subject . . . It may be conceded that the petitioner does not have all the refined skills or specialized knowledge some others may boast. But,

[45] Hicks, Exhibit O (JA 27 and JA 121); and Schramm, Exhibit B (JA 200 and JA 222-223).

> surely, that is not reason enough to say that she has no professional standing. We agree with counsel for petitioner that the protection of the grandfather clause is not limited to "exceptionally able people," but was designed also to include those who, though of less than the highest competence, still possess the basic qualifications and meet other legal requirements."

It is an elementary proposition of law that an administrative hearing must be fair and impartial. When it becomes capricious, unreasonable, or an abuse of discretion it constitutes a denial of due process of law. See *Feldman v. Board of Pharmacy*, 160 A.2d 100 (Munic. Ct. App. D.C. 1960). In addition to the examples cited, a reading of the record indicates that the Board's actions were fraught with arbitrary and capricious conduct and that this hearing failed to measure up to the standards of rudimentary fair play. See *Board of Medical Examiners v. Steward*, 203 Md. 574, 102 A.2d 248 (1954).

Totality of the Errors Committed by the District of Columbia Court of Appeals

From the foregoing errors committed by the Board, the petitioners filed their petitions for review with the District of Columbia Court of Appeals, hereinafter referred to as the "D.C. Court". In three separate written opinions (APPENDICES A, B and C, *infra*, A 1-4, B 1-3 and C 1-3), that Court affirmed the decisions of the Board. In affirming these decisions the D.C. Court committed additional errors.

In weighing the totality of the errors committed by the D.C. Court, an analysis of the decisions reveal numerous wrongs not supported by the record in the cases. In the case of all three petitioners, the D.C. Court ignored the fact that they were licensed as professional physical therapists by the Government of the District of Columbia since 1960. It further failed to take into account the fact that the petitioners all maintained individual malpractice insurance for the protection of the general public; and further that all physical therapy treatments were performed under a pre-

scription from a medical doctor. Another common error committed by the D.C. Court in all cases was that it ignored the preconceived decision of the Board which treated the public hearings as a hearing on the denial of the licenses rather than a hearing to determine their qualifications. This error was compounded by ignoring the Board's advocate position in the hearings rather than that of an impartial, fact finding tribunal.

In all cases the D.C. Court ignored the fact that the Board offered no rebuttal evidence of any probative value to the testimony and exhibits presented by the three petitioners. Further, in the absence of a standard, there is no statutory requirement that petitioners' evidence be corroborated, particularly in the absence of contrary proof.

In the cases of both Petitioners Schramm and Hlebanja the D.C. Court ignored the supporting exhibits and evidence which corroborate their testimony.

The D.C. Court in affirming the case of Petitioner Hicks totally ignored his employment prior to 1956 which experience was directly related to physical therapy. It also ignored his actual schooling and training in physical therapy which was supported by documentary evidence and which was uncontradicted.

An error of considerable substance committed by the D.C. Court in the case of Petitioner Hicks was the failure to reverse for an error which the court recognized. This was based upon the finding that he had not graduated from an approved school. The Court acknowledged that Petitioner Hicks' case should not have been considered in that category – yet the Court continued on its wrong course losing sight of the law (APPENDIX A, *infra*, A 1-4).

The D.C. Court further erred in the case of Petitioner Hicks on the question of standards. It found that to be admitted on a Waiver Application on "comparable training or experience" that the standard was that the training or experience was to be comparable to that of a graduate of an approved school. This then resulted in the court's dec-

laration that the standard of proof was, therefore, a high one. While the protection of the public is the purpose of the statute, mere graduation from an "approved school" does not, *ipso facto*, make such an applicant more competent than one with training or experience. Thus the D.C. Court committed further error in attempting to make such training or experience "identical", rather than "comparable" to that of a graduate of an approved school.

In the case of Petitioner Schramm, the D.C. Court, following the erroneous reasoning of the Board, continued the confusion of the two-year practice requirement with the "grandfathers clause". In so doing, it prejudicially eliminated much of the supporting and corroborative evidence of the petitioner which the Board had refused, and the admission of which could have achieved an opposite result upon review. While not manifested in the language of the decisions in cases of Hicks and Hlebanja, this same error was perpetuated by affirmance of their cases.

In further reference to the case of Petitioner Schramm, the D.C. Court, in affirming the case, ignored completely the fact that the decision of the Board was not supported by the evidence in the record. This is manifested by the conclusions drawn by the D.C. Court.

That all the Petitioners were vigorously cross-examined by the members of the Board has been heretofore discussed. In condoning this type of conduct in the case of Petitioner Schramm, it erred in sanctioning an advocate position and permitted the Board to abandon its quasi-judicial position as an impartial, fact finding tribunal. This thread of error, though not appearing in the other two decisions, runs throughout all the cases. On this premise, the D.C.Court chose to ignore the fact that the Board, being composed of physical therapists, was in direct competition with all three of these petitioners and all other applicants.

In the case of Petitioner Hlebanja, the D.C. Court erred in that it assumed that she had received a fair and impartial hearing, although the record fails to support such an assump-

tion. And finally in regard to her case, the D.C. Court ignored her uncontradicted testimony of her substantial physical therapy experience in the military service. The D.C. Court attempted to buttress this finding by stating that she failed to submit her records, even though it is clear that the Board would not accept her exhibits.

The foregoing represents the multiplicity of errors committed by the D.C. Court in affirming the three decisions of the Board. Petitions for rehearings in the case of Petitioners Schramm and Hlebanja to the District of Columbia Court of Appeals were denied.

Totality of the Errors Committed by the United States Court of Appeals for the District of Columbia

From the errors of the District of Columbia Court of Appeals as set forth above, the three petitioners filed their petitions for allowance of appeals with the United States Court of Appeals for the District of Columbia, hereinafter referred to as "U.S. Court". Their appeals were allowed and the three cases were consolidated on October 17, 1966, for all purposes. The U.S. Court, without opinion, handed down a judgment affirming the D.C. Court on June 16, 1967 (APPENDIX D, *infra*, D 1-3).

In affirming the judgments of the D.C. Court, the U.S. Court condoned the errors already committed, as outlined above, and compounded such errors by addition thereto. By failing to write an opinion the U.S. Court left unresolved the important issues raised by these cases.

The more grievous error initially committed by the U.S. Court was the injection into the case of a matter not in issue before the Board or the D.C. Court. In the judgment of June 16, 1967, the U.S. Court stated that it was

> . . . further satisfied that the rulings of the said Board and of the District of Columbia Court of Appeals are not in contravention of such rights as may pertain to

the appellants by virtue of section (4)(e) of the Physical Therapists Practice Act.

The petitioners contend that Section 4(e) [D.C. Code Ann. § 2-453(e), Supp. V. 1966], which states as follows:

> Nothing in this Act shall apply to any person licensed under the Healing Arts Practice Act of the District of Columbia, nor to any employee of any such person working under his immediate supervision and direction in his private office, provided no such employee shall hold herself out, or otherwise represent herself to be a physical therapist.

affords them no relief inasmuch as it requires employment in a private doctor's office directly under the supervision of a physician. In the instant case the petitioners (1) own and operate their own Physical Therapy Clinic, as well as, make hospital and home calls, (2) are self-employed, (3) have no doctor on their staff, petitioners clinical method of operation has been the treatment of patients on medical doctors' prescriptions with follow up letter to continue physical therapy treatment or to state a cut-off date as per APPENDIX G, (G-1), from William J. Tobin, M.D., an Orthopedic Surgeon, (4) maintain their own individual malpractice insurance to protect the general public and (5) have their own business and professional physical therapists licenses issued by the Government of District of Columbia since 1960.

Neither the petitioners nor respondent have ever construed Section 4(e) as having any application to this situation. This is evident from the request of the Board that the Waiver Applications be filed by September 13, 1963, and the efforts of petitioners to comply with these demands (JA 129-130). The Board, through the Executive Secretary Miss McIntyre, contacted the petitioners and insisted that all three applications be filed immediately, and at that time furnished the petitioners with Waiver Applications to be filed pursuant to Section 9(2) of the Act. The applications were filed under Section 9(2) of the Physical Therapists Practice Act [D.C. Code ANN. § 2-458 Supp V, 1966] based upon "compar-

able training or experience," which consists of 20 years for Petitioner Hicks, 15 years for Schramm and 10 years for Hlebanja. The question of the applicability of Section 4(e) was never raised. It is doubtful that the Board would have called for these three applications had Section 4(e) applied to the petitioners.

Further, petitioners obtained Stay Orders on October 7, 1963, from the District of Columbia Court of Appeals, which were continued in effect by the order of October 25, 1963, Petitioner Hicks (JA 1), Schramm (JA 191) and Hlebanja (JA 235). These orders remained in effect until judgments were rendered by the D.C. Court. Thereafter, the petitioners petitioned the U.S. Court for Stay Orders pending their appeals. They therefore submit that such stays would not have been required had they been permitted to carry on their business under Section 4(e).

Further indication that the parties felt that Section 4(e) had no application is manifested by the activities of the investigator for the Board, Robert G. Kirby, during the pendency of the petitions to continue the stays through the U.S. Court. A letter from Counsel for the petitioners, see APPENDIX H, (H-1), was forwarded following his demand that they remove their "Physical Therapy" office sign of which he had taken two pictures on orders from the Chairman of the Board, and to cease operations. Thereafter, the stays were denied in all three cases on August 19, 1966 APPENDICES I and J (I-1 and J-1). On August 22, 1966, Counsel for petitioners advised Mr. Kirby by telephone that the stays had been denied and that they had followed his orders and removed their outside "Physical Therapy" office sign, and had cancelled their listings as Physical Therapists in the yellow pages of the telephone directory, and had ceased operating their Physical Therapy Clinic. They were advised that failure to comply with these orders would result in immediate criminal prosecution of all three of the petitioners.

The only logical conclusion that can be reached is that the petitioners were engaged in the practice of physical

therapy in addition to those activities enumerated by the Board, namely, foot therapy, massage, steam baths and colonic therapy. There would have been no reason for the Board to threaten them with criminal prosecution and force them to close their Physical Therapy Clinic had they been engaged only in those activities which the Board found "not considered to be the practice of physical therapy."[46] Yet having made such a finding of fact, the Board, nevertheless, denied the petitioners due process of law by compelling them to even cease these operations.

Prior to the effective date of the Act, and subsequent to said date and continuing until their stays expired, the petitioners operated as self-employed physical therapists under business and professional licenses in the District of Columbia. Petitioners owned and operated their Physical Therapy Clinic in a building in which they have a financial interest. In this capacity, they treated patients referred to them by medical doctors on prescription only. They had no doctor on their staff, nor were they ever employed by one. It is submitted that under such circumstances the petitioners derive no rights under Section 4(e).

Following the oral argument and prior to the judgment of the U.S. Court, petitioners filed a motion to correct misstatements of Counsel made during oral argument, which motion was granted. This motion contained, *inter alia*, a correction concerning the right of petitioners to be licensed by written examination. This indicated that the petitioners were precluded by the Board from being licensed in that manner (APPENDICES N and O, *infra*, N-1 and O-1). Congress did not intend to legislate persons out of business who have been acceptably engaged in the profession for a number of years. As early as 1910 the Supreme Court in *Watson v. Maryland*, 218 U.S. 173 (1910), said:

> Such exception proceeds upon the theory that those who have acceptably followed the profession in the

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[46]Hicks (JA 88-90), Schramm (JA 201-203) and Hlebanja (JA 244-246).

> community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts.

Immediately following the judgment of the U.S. Court, petitioners promptly filed their petition for rehearing *en banc*. This petition asked, among other things, that the court reconsider the appeals and clarify the judgment with respect to Section 4(e). After an answer was filed to this petition and reply filed thereto, the U.S. Court denied the petition on September 28, 1967 (APPENDIX E, *infra*, (E-1), thereby adding to the totality of errors by leaving unanswered the matter of Section 4(e) which the U.S. Court had injected into the case.

In timely fashion, on October 5, 1967, the petitioners filed a petition for clarification of the judgment. This petition asked, *inter alia*, that the U.S. Court clarify all issues with respect to Section 4(e) for submission to this Court. On October 26, 1967, the U.S. Court denied petitioners' petition for clarification of the judgment (APPENDICES K and L, *infra*, K-1 and L-1). That Court Order again added to the errors already committed by leaving unexplained the issues of Section 4(e) injected into the case.

The effect of the totality of these errors and under the threat of criminal prosecution, the petitioners have been forced to cease operations. This has resulted in a denial of due process of law in that it deprived the petitioners of their livelihoods contrary to the intent and purposes of Congress; loss of substantial property rights in the form of financial interest in the building; their investment in highly specialized equipment in their Physical Therapy Clinic.

CONCLUSION

The basic fundamentals upon which this appeal is based is the need for standards applicable to administrative agencies which represent a National issue of great magnitude in the public interest. This issue should be resolved whether applicable to automobile safety manufacturing standards, Medical Device Safety Act or the licensing of three physical therapists in the District of Columbia. The Court, in its judicial wisdom, should take a second look at this Act and avoid a denial of due process of law under the 5th and 14th Amendments of the Constitution of the United States, thereby affording petitioners some protection under these Amendments. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

G. WILLIAM HAMMER
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1028 Connecticut Avenue, N.W.
Washington, D.C.
Attorney for Petitioners

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 3390

ROBERT WAVERLY HICKS, PETITIONER,

v.

PHYSICAL THERAPISTS EXAMINING BOARD OF THE DISTRICT OF COLUMBIA, RESPONDENT.

On Petition for Review of Decision of Physical Therapists Examining Board of the District of Columbia

(Argued March 21, 1966 Decided July 14, 1966)

G. William Hammer for petitioner.

David P. Sutton, Assistant Corporation Counsel, with whom *Milton D. Korman,* Acting Corporation Counsel, and *Hubert B. Pair,* Assistant Corporation Counsel, were on the brief, for respondent.

Before HOOD, Chief Judge, and QUINN and MYERS, Associate Judges.

HOOD, *Chief Judge:* Petitioner sought registration as a physical therapist without taking and passing the required examination. Under the statute allowing such registration an applicant must present satisfactory evidence of (1) practicing physical therapy in the District of Columbia for the period of two years immediately preceding the effective date of the statute and (2) graduation from an approved School of Physical Therapy *or* (3) comparable training or experience in the practice of physical therapy as determined by the Commissioners.[1] Petitioner did not rely upon the approved education clause, but attempted to prove he had met the practice requirement and possessed comparable training and experience. Finding he did not

[1] D. C. Code 1961, § 2-458 (Supp. V, 1966).

establish these requirements, the Board denied his application.

Petitioner holds a Bachelor of Science degree in civil engineering and a Master of Science degree in the natural sciences. He claims to have practiced physical therapy since 1956. His evidence of comparable training or experience included numerous occupational activities prior to 1956. Among these were employment in the Safety and Health Section, U. S. Army Corps of Engineers, in the United States Patent Office as a patent examiner and in the Veterans Administration as a mechanical engineer and draftsman. In 1943-44 he worked with a Doctor of naturopathy on a research project. In 1951-53 he took evening courses in a school of naturopathy and in 1953-56 he worked part time in a physical therapy clinic. Upon leaving the clinic he began his own practice.

In finding that petitioner produced no evidence of having graduated from an approved school of therapy the Board indicated that it considered all of petitioner's education, including his study and clinical experience at the school of naturopathy, only in reaching its determination of noncompliance with the education clause. This was error because petitioner made no claim to graduation from an approved school of therapy. He offered his schooling, study and training as proof of comparable training or experience, the statutory alternative to graduation from an approved school, and it should have been considered under that category. However, we do not regard this error as sufficiently prejudicial to warrant reversal.

Petitioner sought to establish his right to registration without examination, and in an administrative proceeding the burden of proof is generally upon the party asserting the affirmative of an issue.[2] The statutory standard for proof of comparable training or experience is a high one. The Congress intended to secure safe performance in the practice of physical therapy.[3] Training or experience offered to meet the statute must establish that the applicant's competence to assist his patients without endanger-

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[2] *Bernstein* v. *Real Estate Commission of Maryland*, 221 Md. 221, 156 A.2d 657 (1959), appeal dismissed 363 U.S. 419, rehearing denied 364 U.S. 853.

[3] Senate Rep. No. 823, 87th Cong., 1st Sess.2 (1961); H.R. Rep. No. 1146, 87th Cong., 1st Sess. 2 (1961).

ing their health and safety is "comparable" to that of a therapist who has graduated from an approved school of physical therapy. However, this is not to say that the applicant must possess all of the refined skills and specialized knowledge presumably possessed by a graduate of an approved school. A showing of two years practice in the prescribed period gives the applicant the protection dictated by the inclusion of a "grandfather's clause" in this statute. Although he is not entitled to registration simply because he has practiced, his practice is a compensatory circumstance to be considered in weighing his possible shortcomings in refinement of skills and specialization of knowledge.[4] In assessing comparability, then, the Board must focus its attention on two competing rights: the right of the public to be protected from incompetent practitioners of physical therapy and the right of the applicant to continue to gain a livelihood by practicing his calling.[5] The petitioner here relied upon a curriculum listing and an affidavit of attendance to establish the comparability of his training and experience at the school of naturopathy. Such minimal, *pro forma* evidence is hardly an assurance of his ability to safely perform physical therapy.

Petitioner further contends that he presented substantial evidence of his comparable training and experience. In reviewing the merits of comparability we are bound to recognize the expertise of the Board, a panel of Registered Physical Therapists. The record shows that any relation of petitioner's former employment to physical therapy was effectively contradicted. The relevancy of his nonengineering education to the practice of physical therapy was a matter of judgment for the Board. We cannot say that the Board erred in finding that the evidence did not meet the statutory standard. The alleged errors in the admission of evidence are either unfounded or insubstantial.

It is also contended that the Board erred in not creating and publishing a standard for comparable training or experience before the hearing. We disagree. Although the Board has statutory authority to prescribe rules and

[4] See *Sherman* v. *Physical Therapists Examining Board*, D.C. App., 208 A.2d 728 (1965).

[5] *Corbett* v. *Kinlein*, D.C.App., 191 A.2d 246 (1963).

regulations,[6] the choice made between proceeding by a general rule or by individual, ad hoc litigation is one that lies primarily within its informed discretion.[7] The training and experience of each applicant may well be too variable to permit the application of a rigid rule of comparability.

Affirmed.

[6] D. C. Code 1961, § 2-456(a) Supp. V, 1966).
[7] *Securities and Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947).

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 3391

LEONA E. SCHRAMM, PETITIONER,

v.

PHYSICAL THERAPISTS EXAMINING BOARD OF THE DISTRICT OF COLUMBIA, RESPONDENT.

On Petition for Review of Decision of
The Physical Therapists Examining Board
of the District of Columbia

(Argued March 21, 1966 Decided June 1, 1966)

G. William Hammer for petitioner.

David P. Sutton, Assistant Corporation Counsel, with whom *Milton D. Korman,* Acting Corporation Counsel, and *Hubert B. Pair,* Assistant Corporation Counsel, were on the brief, for respondent.

Before HOOD, Chief Judge, and QUINN and MYERS, Associate Judges.

QUINN, *Associate Judge:* Petitioner seeks review of respondent's denial of her application for registration as a physical therapist without examination pursuant to Code 1961, § 2-458 (Supp. V, 1966). This statute requires the Examining Board to register without examination an applicant who

> "* * * *presents evidence* satisfactory to the Commissioners that she was * * * practicing physical therapy in the District of Columbia for a period of two years immediately preceding the effective date of this subchapter, *and* that she (1) has graduated from an approved school of physical therapy listed in the register of approved schools *or* (2) received comparable training or

experience in the practice of physical therapy as determined by the Commissioners. * * *" (Emphasis added.)

In September 1963 respondent rejected petitioner's application without a hearing, but on appeal we remanded for a proper hearing in accordance with our decision in *Corbett* v. *Kinlein,* D.C.App., 191 A.2d 246 (1963). Following the hearing held on February 26, 1965, at which petitioner alone testified as to her qualifications, respondent found that she did not qualify under the statute, and again rejected her application. It is from this denial that petitioner appeals.

It is a fundamental principle of administrative proceedings that the burden of proof is on the proponent of a rule or order. 2 Am. Jur. 2d *Administrative Law* § 391 (1962); 73 C.J.S. *Public Administrative Bodies and Procedure* § 124 (1951); *accord,* Federal Administrative Procedure Act, 5 U.S.C.A. § 1006(c). The statute involved herein likewise speaks of registration of an applicant "who presents evidence" of certain qualifications. It is this burden of proof with which we are chiefly concerned.

Petitioner testified that her formal education ended with high school, and no claim was made that she "graduated from an approved school of physical therapy." It was therefore necessary for her to satisfy the Board that she had received "comparable training or experience." As noted above, the only evidence presented to the Board was her own testimony, and while it is generally true that uncontradicted testimony, even of an interested party, may not be disregarded and may, in some instances, be sufficient to prove a case, we feel that something more was required here. Indeed, since the purpose of registration is the protection of the public from incompetent practitioners, this public interest requires that something more than an applicant's self-serving declarations be presented to the Board as evidence. See S. Rep. No. 823, 87th Cong., 1st Sess. 2 (1961).

Petitioner argues, however, that the "grandfather clause," which requires two years' practice in the District, contains the standard applicable to her. While we may agree that the purpose of such a clause is to establish a standard for licensing without examination those who

have acceptably followed a profession for a period of years, a careful reading of Section 2-458 clearly shows that merely satisfying this clause does not satisfy the statute. Petitioner still had the burden of proving that although she did not graduate from an approved school, she received "comparable training or experience." We cannot say that she met this burden by presenting no evidence other than her own recitation of her qualifications.

One further point deserves mention. Petitioner asserts that she did not receive a fair and impartial hearing because (1) she was questioned by both the Assistant Corporation Counsel and the Board, (2) the Board's questions amounted to an "examination," and (3) the Board had previously determined that she was not qualified. We are unable to agree.

It would be unreasonable to rule that Board members may not question an applicant after she has been cross-examined by counsel. Section 2-456 specifically gives them such a right. Their questions, however, should not take the form of an examination. *Sherman* v. *Physical Therapists Examining Board*, D.C.App., 208 A.2d 728 (1965). The record discloses that the overwhelming majority of the questions posed by the Board were concerned with either clarifying petitioner's testimony or eliciting further information as to her training and experience. This type of questioning is not proscribed.

Finally, it cannot fairly be said that the Board's prior denial of petitioner's application was per se prejudicial to her. We find no evidence that the Board had predetermined the issues involved or that the hearing was not fair and impartial.

Affirmed.

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 3392

CECILIA M. HLEBANJA, PETITIONER,

v.

PHYSICAL THERAPISTS EXAMINING BOARD OF THE DISTRICT OF COLUMBIA, RESPONDENT.

On Petition for Review of Decision of Physical Therapists Examining Board of the District of Columbia

(Argued March 21, 1966 Decided June 1, 1966)

G. William Hammer for petitioner. *Richard A. Mehler* and *Charles P. Hovis* also entered an appearance for petitioner.

David P. Sutton, Assistant Corporation Counsel, with whom *Milton D. Korman,* Acting Corporation Counsel, and *Hubert B. Pair,* Assistant Corporation Counsel, were on the brief, for respondent.

Before HOOD, Chief Judge, and QUINN and MYERS, Associate Judges.

MYERS, *Associate Judge:* Petitioner seeks review of the denial by the Physical Therapists Examining Board of her application for registration as a physical therapist in the District of Columbia without examination.[1] Her application was first rejected by the Board in September 1963, but, upon appeal, we remanded for a proper hearing as

[1] D. C. Code, 1961, § 2-458 (Supp. V, 1966). "The Commissioners shall register as a physical therapist, without examination, any physical therapist who is at least twenty years of age and of good moral character and who presents evidence satisfactory to the Commissioners that she was, prior to the effective date of this subchapter, practicing physical therapy in the District of Columbia for a period of two years immediately preceding the effective date of this subchapter, and that she (1) has graduated from an approved school of physical therapy listed in the register of approved schools or (2) received comparable training or experience in the practice of physical therapy as determined by the Commissioners. * * *"

required by our decision in *Corbett* v. *Kinlein*, D.C.App., 191 A.2d 246 (1963). After a fair and impartial hearing, her application was again rejected upon the Board's finding that she did not meet the standards specified. The principal question here is whether the Board abused its discretion in reaching its conclusion, upon the evidence presented by petitioner, that she did not meet the statutory qualifications for registration, without examination, as a physical therapist.

In administrative proceedings, as here, the burden is generally upon the party asserting the affirmative of an issue.[2] The burden in the instant case was upon petitioner to present evidence satisfactory to the Board to establish, in the absence of any showing that she had "graduated from an approved school of physical therapy listed in the register of approved schools," that she had "received comparable training or experience in the practice of physical therapy." Petitioner claimed to be entitled to registration on the bases of a high school education, of military service as a pharmacist's mate in the Naval Medical Corps during World War II, of completion of various courses, unrelated to physical therapy, at several universities and colleges, of part-time work and study in the field of physical therapy at a now defunct school of "naturopathy" about twelve years prior to her hearing before the Board, and of associations with two other persons in the practice of physical therapy in the District of Columbia since 1959. Other than appellant's own testimony, no evidence was submitted in any form to support the application—no official records of her military service and duties, no official college or university transcripts, nothing to corroborate her claimed part-time work and study at the school of "naturopathy," and no references or endorsements from licensed physicians to verify her competency.

Under the circumstances we are of the opinion that appellant failed to furnish "evidence satisfactory" to the Board that she had received "comparable training or experience" in the practice of physical therapy so as to entitle her to registration as a practitioner for that purpose without examination. Public interest dictates that

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[2] *Bernstein* v. *Real Estate Commission of Maryland*, 221 Md. 221, 156 A.2d 657 (1959); *appeal dismissed* 363 U.S. 419, *rehearing denied* 364 U.S. 855 (1960); 2 Am.Jur. 2d, Administrative Law, § 391 (1962).

something more than mere self-serving declarations be offered as proof of competency; otherwise the primary purpose of the statute to protect the public from unqualified practitioners of physical therapy would be circumvented.

We therefore find no abuse of discretion in the Board's denial of petitioner's application for registration as a physical therapist without ~~a license~~ examination.

Other alleged errors have been considered and found to be without merit. See *Schramm* v. *Physical Therapists Examining Board of the District of Columbia*, D.C.App., A.2d , decided June 1, 1966.

Affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit
Washington 1, D.C.

Nathan J. Paulson
Clerk

June 16, 1967

No. 20260 – Schramm)
No. 20261 – Hlebanja) v. Physical Therapists
No. 20343 – Hicks) Examining Board

Dear Sirs:

I am enclosing herewith a copy of the judgment of this court (no opinion) entered today in the above-entitled cases.

Very truly yours,

/s/ Nathan J. Paulson
Clerk

G. William Hammer, Esq.
LaSalle Bldg., Suite 803
1028 Connecticut Ave., N.W.
Washington, D.C. 20036

Charles T. Duncan, Esq.
Corporation Counsel
District Bldg.
Washington, D.C. 20004

Attention: Appellate Division

Clerk
District of Columbia Court of Appeals
400 F Street, N.W.
Washington, D.C. 20001

[Filed June 16, 1967]

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 20,260 September Term, 1966
D.C.C.A. 3390-1-2

Leona E. Schramm,
Appellant,

No. 20,261

Cecilia M. Hlebânja,
Appellant,

No. 20,343

Robert Waverly Hicks,
Appellant,

v.

Physical Therapists Examining Board for the District of Columbia,
Appellee.

Appeals from the District of Columbia Court of Appeals

Before: Wilbur K. Miller, Senior Circuit Judge, and Danaher and Burger, Circuit Judges.

JUDGMENT

The appellants in the above consolidated cases having sought registration as physical therapists, without examination, pursuant to the provisions of D. C. CODE § 2-458 (Supp. V, 1966), their respective applications having been denied, the District of Columbia Court of Appeals having affirmed, and review having been sought in this court, where the said cases came on to be heard on the records on appeal from the District of Columbia Court of Appeals and argument was had on April 19, 1967, when the respective parties appeared by counsel and were fully heard; and this court having considered the arguments, the briefs and the administrative records, and the opinions of the said Dis-

trict of Columbia Court of Appeals; and finding itself satisfied that the District of Columbia Court of Appeals correctly concluded: (1) that the Physical Therapists Examining Board for the District of Columbia had not acted arbitrarily and capriciously, (2) that the said appellants had not established their claimed right to registration as physical therapists without examination, and (3) the said Board had not unfairly denied the pending applications by misapplication of the basic statute;

and this court being further satisfied that the rulings of the said Board and of the District of Columbia Court of Appeals are not in contravention of such rights as may pertain to the appellants by virtue of section (4)(e) of the Physical Therapists Practice Act;

Now, upon consideration of the foregoing and of the records before the court,

It is ORDERED and ADJUDGED by this court that the judgments of the District of Columbia Court of Appeals appealed from in these cases are affirmed.

Per Curiam.

Dated: June 16, 1967

APPENDIX E

[Filed September 28, 1967]

ORDER

The Clerk is directed to file appellants' lodged reply to the opposition to the petition for rehearing *en banc* and on consideration whereof and on consideration of appellants' petition for rehearing *en banc* and of appellee's opposition thereto, it is

ORDERED by the Court *en banc* that appellants' aforesaid petition is denied.

Per Curiam.

APPENDIX F

Public Law 87-280
87th Congress, S. 1762
September 22, 1961

An Act

75 STAT. 578.

To regulate the practice of physical therapy in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Physical Therapists Practice Act". Physical Therapists Practice Act.

DEFINITIONS

SEC. 2. As used in this Act—

(a) The term "Commissioners" means the Commissioners of the District of Columbia sitting as a board, or their authorized agent or agents.

(b) The word "she" and the derivatives thereof shall be construed to include the word "he" and the derivatives thereof.

(c) The term "physical therapy" means the treatment of human disability, injury, or disease by supervised therapeutic procedures embracing the specific scientific application of physical measures to secure the functional rehabilitation of the human body. Nothing in this Act shall be construed as authorizing a physical therapist, whether registered or not, to practice medicine, osteopathy, chiropractic, naturopathy, or any other form or method of healing.

(d) The term "physical therapist" means a person who practices physical therapy under the prescription, supervision, and direction of a person licensed to practice under the Healing Arts Practice Act of the District of Columbia, approved February 27, 1929 (45 Stat. 1326), as amended. D. C. Code 2-139.

(e) The word "State" or "States" shall be deemed to include any territory of the United States and the Commonwealth of Puerto Rico.

EXEMPTION FROM REGISTRATION

SEC. 3. This Act shall not apply to any person employed in the District of Columbia by the Federal Government or any agency thereof while such person is acting in the discharge of her official duties.

REGISTRATION

SEC. 4. (a) No person shall practice physical therapy in the District of Columbia unless (1) she is duly registered in accordance with the provisions of this Act, or (2) is exempted from such registration by the terms of this Act.

(b) No person not registered in accordance with the provisions of this Act, unless exempted from registration by the terms of this Act, shall, directly or indirectly, (1) represent herself to be so registered or (2) represent herself to be certified, licensed, or authorized to practice physical therapy.

(c) No person shall use in connection with her name the words "physical therapist", "physiotherapist", "physical therapy technician", or use the initials "P.T.", "P.T.T.", "R.P.T.", or any other letters, words, abbreviations, or insignia indicating or implying that she is a registered physical therapist, unless such person is a holder of a valid registration under this Act.

(d) Nothing in this section shall prohibit any person duly licensed or registered in the District of Columbia under any other Act from engaging in the practice for which she is duly registered or licensed.

(e) Nothing in this Act shall apply to any person licensed under the Healing Arts Practice Act of the District of Columbia, nor to any 45 Stat. 1326, D. C. Code 2-139.

employee of any such person working under his immediate supervision and direction in his private office, provided no such employee shall hold herself out, or otherwise represent herself to be a physical therapist.

POWERS OF COMMISSIONERS

SEC. 5. The Commissioners are hereby vested with full power and authority to delegate, from time to time, to their designated agent or agents, any of the functions vested in them by this Act.

ESTABLISHMENT OF BOARD

SEC. 6. The Commissioners may establish a physical therapists examining board to perform any of the functions vested in the Commissioners by this Act, and, if so established, such board shall be composed of such persons posssessing such qualifications as the Commissioners shall determine. The Commissioners are authorized to prescribe the terms of office of members of such board and to fix the compensation of such members. The Commissioners may appoint as members of such board, Federal and District government employees, and such members shall not be entitled to receive compensation as board members, and any such member shall not be debarred by such membership from employment in the Federal or District governments not inconsistent with her duties as a board member. Any board member may receive her compensation as a board member as well as any retirement pay, retirement compensation, or annuity to which she may be entitled on account of previous service rendered to the United States or the District of Columbia governments.

POWERS AND DUTIES

Rules and regulations.

SEC. 7. (a) The Commissioners are authorized to adopt from time to time and prescribe such rules and regulations as may be necessary to enable them to carry into effect the provisions of this Act. The Commissioners shall maintain a register of all persons registered as physical therapists. The Commissioners shall maintain a register of approved schools which they deem afford adequate training in physical therapy.

Register.

Studies and investigations.

(b) The Commissioners may make such studies and investigations, and obtain or require the furnishing of such information under oath or affirmation or otherwise, as they deem necessary or proper to assist them in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act, and regulations and orders thereunder. For such purposes, the Commissioners may administer oaths and affirmations, may require by subpena or otherwise the attendance and testimony of witnesses and the production of documents at any designated place. In the event of contumacy or refusal to obey any such subpena or requirement under this section, the Commissioners may make application to the municipal court for the District of Columbia for an order requiring obedience thereto. Thereupon the court, with or without notice and hearing, as it in its discretion may decide, shall make such order as is proper and may punish as a contempt any failure to comply with such order in accordance with the provisions of subsection (c), section 5, of the Act of April 1, 1942 (56 Stat. 193, chapter 207; sec. 11-756(c), D.C. Code, 1951 edition).

REGISTRATION

SEC. 8. The Commissioners shall register as physical therapists all applicants who prove to the satisfaction of the Commissioners their fitness for registration under the terms of this Act. The Commissioners shall issue to each person registered a certificate of registration, which shall be prima facie evidence of the right of the person to whom it is issued to represent herself as a registered physical therapist, and authorized to practice as such under this Act. Issuance of certificate.

REGISTRATION WITHOUT EXAMINATION

SEC. 9. The Commissioners shall register as a physical therapist, without examination, any physical therapist who is at least twenty years of age and of good moral character and who presents evidence satisfactory to the Commissioners that she was, prior to the effective date of this Act, practicing physical therapy in the District of Columbia for a period of two years immediately preceding the effective date of this Act, and that she (1) has graduated from an approved school of physical therapy listed in the register of approved schools or (2) received comparable training or experience in the practice of physical therapy as determined by the Commissioners. Application for registration under this section shall be made on or before the expiration of one year from the effective date of this Act. Application date.

REGISTRATION AFTER EXAMINATION

SEC. 10. The Commissioners shall pass upon the qualifications of applicants for registration, provide for and conduct all examinations, determine which applicants have successfully passed the examination and duly register such applicants. To be eligible to be examined for registration as a physical therapist, an applicant must meet the following requirements: Eligibility requirements.

(a) Be at least twenty years old.

(b) Be of good moral character.

(c) Be in good physical and mental health, as certified by a physician licensed to practice in the District of Columbia.

(d) Be a graduate of an approved school of physical therapy listed in the register of approved schools; or possess comparable educational qualifications as determined by the Commissioners.

The examinations specified in this section shall be conducted at such times and places as the Commissioners may determine, and notice of time and place of such examination shall be published not less than thirty days before the first day of each examination in one or more newspapers of local circulation.

The examination shall embrace such coverage of the following subjects to determine the applicant's qualification: The applied sciences of anatomy, neuroanatomy, kinesiology, physiology, pathology, physics; "physical therapy" as defined in this Act, applied to medicine, neurology, orthopedics, pediatrics, psychiatry, surgery; medical ethics; technical procedures in the practice of "physical therapy" as defined in this Act.

RECIPROCITY

SEC. 11. Any applicant who has practiced physical therapy and has been registered, certified, or licensed as such in any State may, upon proof of good moral character, be registered without examination, provided the applicant has graduated from a school of physical therapy approved by the Commissioners, or has received competent

comparable training as determined by the Commissioners. It is intended that the standards of education and training required for registration under this section shall be substantially equivalent to those required for registration pursuant to section 10 of this Act. This section shall be construed to apply only to candidates from States which admit registered physical therapists of the District of Columbia without examination.

RENEWAL OF REGISTRATION

SEC. 12. (a) Every registered physical therapist engaged in or who proposes to engage in the practice of physical therapy in the District of Columbia is hereby required to register with the Commissioners annually. Any registrant who allows her registration to lapse by failing to renew the registration annually may be reinstated by the Commissioners by showing cause satisfactory to the Commissioners for such failure and upon payment of all required fees. The Commissioners are authorized, after public hearing, to change from time to time the period for which registration or renewal thereof may be issued.

Nonpracticing therapists.

(b) Any person registered under the provisions of this Act but not so practicing in the District of Columbia shall give written notice of such fact to the Commissioners. Upon receipt of such notice, the Commissioners shall place the name of such person upon the nonpracticing list. While remaining on such list, such person shall not be subject to the payment of any renewal fee and shall not hold herself out as a registered physical therapist nor practice as such in the District of Columbia. Application for renewal of registration and payment of renewal fee for the current year shall be made to the Commissioners by any such person desiring to resume practice as a registered physical therapist.

DENIAL, REVOCATION, AND SUSPENSION OF REGISTRATION

SEC. 13. The Commissioners are authorized and empowered to deny, revoke, or suspend any registration or certificate of renewal of registration issued by the Commissioners or applied for in accordance with the provisions of this Act if the applicant or holder thereof—

(1) has been guilty of fraud or deceit in procuring or attempting to procure any registration or renewal thereof provided for in this Act;

(2) has been convicted of a crime involving moral turpitude;

(3) is an intemperate consumer of intoxicating liquors or is addicted to the use of habit-forming drugs;

(4) has been guilty of unprofessional conduct;

(5) has willfully violated any of the provisions of this Act, or rules or regulations promulgated by the Commissioners pursuant to authority contained in this Act;

(6) is mentally incompetent;

(7) is guilty of undertaking to treat ailments of human beings other than by physical therapy as authorized by this Act, or the undertaking to practice physical therapy independent of the prescription and direction of a person appropriately licensed to practice under the Healing Arts Practice Act of the District of Columbia; or

(8) is otherwise professionally incapacitated.

Provided, That such denial, revocation, or suspension shall be made only upon specific charges in writing. A copy of any such charges and at least ten days' notice of the hearing of the same shall be mailed to the holder of or applicant for such registration, addressed to her at her last known address.

COURT REVIEW

SEC. 14. Any person aggrieved by any final decision or final order of the Commissioners denying, suspending, or revoking any registration, or renewal of registration, issued or applied for under this Act may obtain a review thereof in the municipal court of appeals for the District of Columbia, and may seek a review by the United States Court of Appeals for the District of Columbia Circuit of any judgment of the municipal court of appeals entered pursuant to its review of any such decision or order, all in accordance with subsection (f) of section 7 of the Act approved April 1, 1942, as added by the Act approved August 31, 1954 (68 Stat. 1049). D. C. Code 11-772.

UNAUTHORIZED PRACTICE OF PHYSICAL THERAPY

SEC. 15. It shall be unlawful for any person in the District of Columbia to—

(a) sell or fraudulently obtain or furnish any diploma, license, certificate of registration, or record required by this Act, or required by the Commissioners under authority of this Act, or aid or abet in the selling, fraudulently obtaining, or furnishing thereof;

(b) practice physical therapy under cover of any diploma, certificate of registration, or record required by this Act or required by the Commissioners under authority of this Act, illegally or fraudulently obtained or signed or issued unlawfully or under fraudulent registration;

(c) use in connection with her name any designation tending to imply that she is a registered physical therapist, unless duly registered under provisions of this Act;

(d) practice physical therapy during the time her registration shall be suspended or revoked.

PRACTICE OF REGISTERED PHYSICAL THERAPISTS

SEC. 16. A person registered under this Act as a physical therapist shall not treat human ailments by physical therapy or otherwise except under the prescription and direction of a person duly licensed or registered under the Healing Arts Practice Act of the District of Columbia. 45 Stat. 1326. D. C. Code 2-139.

ENFORCEMENT

SEC. 17. Any person who shall violate the provisions of section 4, 15, or 16 of this Act shall be guilty of a misdemeanor and shall be punished by a fine of not exceeding $500 or by imprisonment for not more than one year, or both.

CONDUCT OF PROSECUTIONS

SEC. 18. (a) Prosecutions for violations of any provisions of section 4, 15, or 16 of this Act shall be conducted in the name of the District of Columbia in the municipal court for the District of Columbia, by the Corporation Counsel or any of his assistants.

(b) It shall be necessary to prove in any prosecution or hearing under this Act only a single act prohibited by law or a single holding out or an attempt without proving a general course of conduct in order to constitute a violation.

FEES AND CHARGES

Public hearings to change fees.

SEC. 19. (a) The Commissioners are authorized and empowered, after a public hearing, to fix and, from time to time increase or decrease, fees for any services rendered under this Act. The Commissioners shall, pursuant to this section, increase, decrease, or fix fees in such amounts as will, in the judgment of the Commissioners, approximate the costs to the District of Columbia of administering this Act: *Provided*, That no fee shall be increased, decreased, or fixed except after a public hearing.

(b) Upon the change of a registration period as authorized by subsection (a) of section 12 the fee for registration or renewal of registration shall be prorated on the basis of the time covered.

(c) All moneys collected for fees and charges made pursuant to authority contained in this Act shall be paid into the Treasury to the credit of the District of Columbia.

SEVERABILITY

SEC. 20. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

APPROPRIATIONS

SEC. 21. There is hereby authorized to be appropriated out of the revenues of the District of Columbia such sums as may be necessary to pay the expenses of administering and carrying out the purposes of this Act.

REORGANIZATION

SEC. 22. Nothing in this Act shall be construed so as to affect the authority vested in the Board of Commissioners of the District of Columbia by Reorganization Plan Numbered 5 of 1952 (66 Stat. 824). The performance of any function vested by this Act in the Board of Commissioners or in any office or agency under the jurisdiction and control of said Board of Commissioners may be delegated by said Board of Commissioners in accordance with section 3 of such plan.

D. C. Code title 1 app.

EFFECTIVE DATE

SEC. 23. This Act shall take effect one hundred and twenty days after funds are appropriated for the purpose of administering the provisions of this Act.

Approved September 22, 1961.

GPO 72139

APPENDIX G

J. A. TALBOT, M.D.
W. J. TOBIN, M.D.
T. M. FOLEY, JR., M.D.
STANFORD A. LAVINE, M.D.
Columbia Medical Building
1835 Eye Street, N.W.
Washington, D.C. 20006

September 22, 1965

Mr. Robert W. Hicks
1920 Eye Street, N.W.
Washington, D.C. 20006

Re: Mr. James Morton

Dear Mr. Hicks:

The above-named patient was seen on September 20, 1965, and after examination, it was recommended that the patient continue with his physical therapy treatments.

Thanking you for your cooperation, I am,

Sincerely yours,

/s/ William J. Tobin, M.D.

APPENDIX H

G. WILLIAM HAMMER
Attorney at Law
210 Little Falls Street
Falls Church, Virginia

August 11, 1966

Mr. Robert Kirby, Investigator
Department of Occupations and
Professions for the District of
Columbia
Washington, D.C.

Re: Robert Waverly Hicks
Leona E. Schramm
Cecilia M. Hlebanja

Dear Mr. Kirby:

This letter is being written regarding your recent inquiry concerning the Petition for a Stay now pending in the United States Court of Appeals for the District of Columbia Circuit. This is a petition to continue the mandate from the District of Columbia Court of Appeals which was granted on October 7, 1963.

As soon as the Court rules on these petitions, I will notify you promptly of the outcome. If you have any questions, please feel free to contact me.

Very truly yours,

/s/ G. William Hammer

APPENDIX I

[Filed August 19, 1966]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Leona E. Schramm, Petitioner,

v. No. 20,260

Physical Therapists Examining Board
for the District of Columbia,
Respondent

Cecilia M. Hlebanja, Petitioner

v. No. 20,261

Physical Therapists Examining Board
for the District of Columbia,
Respondent

ORDER

On consideration of petitioners' petitions for the allowance of appeals from the District of Columbia Court of Appeals, of the briefs filed by the parties with respect thereto and on consideration of petitioners' motions for stay and the responsive pleadings filed with respect thereto, it is

ORDERED by the court that the petitioners' petitions for the allowance of an appeal and the motions for stay are denied.

Per Curiam

APPENDIX J

[Filed August 19, 1966]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Robert Waverly Hicks, Petitioner

v. No. 20,343

Physical Therapists Examining Board
for the District of Columbia
Respondent

ORDER

On consideration of petitioner's petition for stay and memorandum in support thereof and respondent's opposition thereto and memorandum in response, it is

ORDERED by the court that petitioner's aforesaid petition is denied.

Per Curiam

APPENDIX K

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

October 25, 1967

G. William Hammer, Esquire
Suite 803
La Sale Building
1028 Connecticut Avenue, N.W.
Washington, D.C.

Dear Mr. Hammer:

In view of the attached order, I am returning herewith the original and three copies of your lodged petition for clarification.

Yours very truly,

Nathan J. Paulson, Clerk

/s/ Alexander L. Stevas
Chief Deputy Clerk

cc: David P. Sutton, Esquire
Corporation Counsel

APPENDIX L

[Filed October 26, 1967]

ORDER

On consideration of appellants' motion for leave to file a petition for clarification of judgment and of appellee's opposition thereto, it is

ORDERED by the Court that appellants' aforesaid motion is denied.

Per Curiam.

APPENDIX M

[Excerpt of the testimony of Hope H. McIntyre, Executive Secretary, from the case of *Sherman v. Physical Therapists Examining Bd.*, 208 A.2d 728 (D.C. Ct. App. 1965), Case No. 3629, (R. 11-14)].

BY MR. MIDDLETON:

Q. Now as to the number two requirement, received comparable training or experience in the practice of physical therapy as determined by the Commissioners. What does that mean?

MR. OPPENHEIMER: I don't think the witness is competent to explain what the statute means.

MR. MIDDLETON: Well this witness, as I think I have established up to this point, was instrumental in the processing of this application and the rejection thereof and I think that for the record I think we should know why it was rejected. I mean just what was considered under that particular aspect of the requirements.

MISS ARRINGTON: The objection is overruled. Miss McIntyre will proceed.

THE WITNESS: Would you state the question again?

BY MR. MIDDLETON:

Q. Just what was considered under the number 2, received comparable training or experience in the practice of physical therapy as determined by the Commissioners? A. In considering what was listed on her application as compared to what the Commissioners require, it was not comparable.

Q. That is what I am getting at. What is required? A. It is a lengthy document which gives a listing of a number of years that would be required in certain, either institutions, doctors' offices or schools, to meet the requirement.

Q. Is this a copy of that document? A. This is a copy of the document.

MR. MIDDLETON: Let this be marked as Board's Exhibit No. 1 for identification, please.

(Board's Exhibit No. 1 was marked for identification.)

BY MR. MIDDLETON:

Q. Now, Mrs. McIntyre, I show you a document which is entitled "Criteria for Meeting Requirements of Public Law 87-280, Section 9, (2), 'Received Comparable. . . Experience in Practice of Physical Therapy. . .'" and ask you if that is the document of which you recently spoke? A. It is.

MR. MIDDLETON: Mr. Oppenheimer, you have a copy of it?

MR. OPPENHEIMER: I believe it is the same one.

THE WITNESS: Yes, it is.

MR. MIDDLETON: Without objection I offer this into evidence without reading it.

MR. OPPENHEIMER: Just a moment, I want to ask some qualifying questions.

MR. MIDDLETON: All right.

MR. OPPENHEIMER: Mrs. McIntyre, when was this document prepared? It doesn't bear any date.

THE WITNESS: May, 1963.

MR. OPPENHEIMER: May, what date in May?

THE WITNESS: I couldn't give you an exact date.

MR. OPPENHEIMER: Was this published anywhere?

THE WITNESS: As you see it.

MR. OPPENEHEIMER: Did it appear in any document given to the public?

THE WITNESS: Upon request it is given to the public.

MRS. ARRINGTON: Mr. Middleton, do you have any further questions of this witness.

MR. MIDDLETON: I was waiting. Are you finished, Mr. Oppenheimer?

MR. OPPENHEIMER: Who adopted these requirements?

THE WITNESS: They are adopted by the Physical Therapist Examining Board.

MR. OPPENHEIMER: Was a copy of this ever sent to Miss Sherman?

THE WITNESS: No.

MR. OPPENHEIMER: Why not?

THE WITNESS: It was not requested.

MR. OPPENHEIMER: You didn't think she would be interested in seeing it?

THE WITNESS: I didn't think anything.

MR. OPPENHEIMER: I don't have any further questions.

MR. MIDDLETON: I offer this then as Board's Exhibit No. 1.

MISS ARRINGTON: We will accept this as Exhibit No. 1.

(Board's Exhibit No. 1, ["Appendix B"] was received in evidence) [12-page document – *Sherman* case Record pp. 242-253].

* * *

APPENDIX N

AFFIDAVIT

I, ROBERT W. HICKS, first being duly sworn on oath depose and say that during the last week in February, 1963, just after the effective date of the Physical Therapists Practice Act, February 20, 1963, I went to the office of the Physical Therapists Examining Board for the District of Columbia to make inquiry concerning registration for license as a Physical Therapist in the District of Columbia. Upon inquiry about taking the written examination I was asked whether I had graduated from one of the schools approved by the American Physical Therapy Association and by the Council on Medical Education and Hospitals of the American Medical Association; upon advising the Board that I was not, I was then informed that I would not be allowed to take the written national examination given by the Board and therefore must file a "waiver application". I was then given the necessary blank waiver forms to be filed with the Board, which I duly executed and filed under the circumstances.

/s/ Rob't W. Hicks
Robert W. Hicks

[Notarial Certification, dated April 20, 1967.]

APPENDIX O

AFFIDAVIT

I, LEONA E. SCHRAMM, first being duly sworn on oath depose and say that during the latter part of February, 1963, shortly after the effective date of the Physical Therapist Practice Act of February 20, 1963, I went with Mr. Robert W. Hicks, one of my associates, to the Office of the Physical Therapist Examining Board, the purpose being to receive an application to take the written examination for registration as a physical therapist in the District of Columbia.

We were informed that due to the fact that we were not graduates from one of the schools approved by the American Physical Therapy Association and by the Council on Medical Education and Hospitals of the American Medical Association that we would not be allowed to take a written examination. We were furnished with blank waiver application forms by the Board which I executed and filed.

/s/ Leona E. Schramm

[Notarial Certification, dated April 20, 1967.]

SUPREME COURT, U. S.

FILED

FEB 28 1968

JOHN F. DAVIS, CLERK

BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1027

ROBERT WAVERLY HICKS, *et al.*,
Petitioners,

v.

PHYSICAL THERAPISTS EXAMINING BOARD
OF THE DISTRICT OF COLUMBIA,
Respondent.

On petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation Counsel, D. C.

RICHARD W. BARTON,
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PRINTING DIVISION—D. C. GOVERNMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1027

ROBERT WAVERLY HICKS, *et al.*,
Petitioners,

v.

PHYSICAL THERAPISTS EXAMINING BOARD
OF THE DISTRICT OF COLUMBIA,
Respondent.

On petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Where, in the construction of a professional licensing statute of purely local application, the District of Columbia

Court of Appeals concluded that petitioners lacked the necessary qualifications to engage in the practice of physical therapy in the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit affirmed, should not this Court refuse to exercise its jurisdiction to review on writ of certiorari?

COUNTER-STATEMENT OF THE CASE

On September 16, 1963, petitioners filed applications for registration, without examination, as physical therapists pursuant to § 2-458, D. C. Code, 1967.[1]

Following the initial denial of their applications, petitioners, represented by counsel, were given separate public hearings at which they testified in conclusory fashion as to their background and experience, most of which was unrelated to physical therapy[2] (J. A. 32, 107-109, 110, 115, 116, 132-137, 204, 207, 210, 211, 215, 216. 247, 248, 250, 251, 254, 257, 260, 261). Petitioners at no time attempted to relate their alleged experience in any phase of physical therapy to either the number of hours devoted to its practice or to the number of patients treated, and they produced no records or case histories in this regard. Petitioners did not claim that they were ever employed at a hospital or nursing home, and they did not call as a witness or name as a reference, to attest to their alleged training and experience, any member of the medical or physical therapy professions.

---

[1] "The Commissioners shall register as a physical therapist, without examination, any physical therapist who is at least twenty years of age and of good moral character and who presents evidence satisfactory to the Commissioners that she was, prior to the effective date of this subchapter, practicing physical therapy in the District of Columbia for a period of two years immediately preceding the effective date of this subchapter, and that she (1) has graduated from an approved school of physical therapy listed in the register of approved schools or (2) received comparable training or experience in the practice of physical therapy as determined by the Commissioners. * * *"

[2] The record negates the claim of petitioner Hicks (J. A. 2, 114) that he was for three years a pre-medical student at the George Washington University (J. A. 31).

Following the hearing, the Physical Therapists Examining Board concluded that petitioners had failed to submit satisfactory proof that they had practiced physical therapy in the District of Columbia during the two-year period immediately preceding the effective date of the Physical Therapists Practice Act (J. A. 89, 202, 245). The Board also concluded that petitioners (who admittedly had not graduated from an approved school of physical therapy) had not demonstrated that they had received comparable training or experience in the practice of physical therapy (J. A. 89, 90, 202, 245).

The District of Columbia Court of Appeals affirmed the orders of the Physical Therapists Examining Board denying petitioners' license applications (J. A. 187, 232, 269). The United States Court of Appeals for the District of Columbia Circuit allowed an appeal and affirmed the judgment of the District of Columbia Court of Appeals and thereafter denied petitions for rehearing *en banc* (petitioners' appendices D and E).

ARGUMENT

Petitioners have failed to present any question of substance warranting the exercise of this Court's jurisdiction to review on writ of certiorari.

The record does not disclose any ground for review conceivably falling within the standards and considerations governing review on writ of certiorari prescribed by Rule 19 of the Rules of this Court. The case involves no more than the construction and application of the District of Columbia Physical Therapists Practice Act, and is, therefore, a matter of purely *local* significance. Under such circumstances, absent a clear showing of egregious error, this Court has consistently refused to exercise its jurisdiction. See *American Security and Trust Co.* v. *District of Columbia*, 224 U. S. 491 (1912); *Del Vecchio* v. *Bowers*, 296

U. S. 280 (1935); *District of Columbia* v. *Pace*, 320 U. S. 698 (1944); *United Surety Co.* v. *American Fruit Product Co.*, 238 U .S. 140 (1915); *Griffth* v. *United States*, 336 U. S. 704 (1949), rehearing denied, 337 U. S. 921 (1949); *Fisher* v. *United States*, 328 U. S. 463 (1946).

There has been no showing of egregious error here. Petitioners do not attempt to demonstrate that the decision of the United States Court of Appeals for the District of Columbia Circuit conflicts with the decision of another circuit court of appeals or with any decision of this Court. While they urge that the failure of respondent to promulgate rules or regulations implementing the statutory requirements for licensure was error, this Court has held otherwise. Under the doctrine of *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 203 (1947), the promulgation of such rules and regulations by respondent is not required, and it is within respondent's informed discretion to proceed by individual *ad hoc* considerations in applying the statutory licensing criteria.[3]

Petitioners attribute to respondent a series of procedural errors and attempt to convert such alleged errors into a constitutional issue involving procedural due process considerations. In this connection, what this Court said in *United Surety Co.* v. *American Fruit Product Co., supra*, is equally applicable here:

> "* * * The constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here. * * *" [238 U. S. at 142.]

---

[3]Petitioners additionally urge that respondent evaluated their cases in accordance with a prejudicial standard which exceeded their authority. The record discloses that no such standard was utilized in the decisional process, and that respondent's decisions were based completely upon an application of the pertinent statutory criteria to the evidence adduced at the administrative proceedings (J. A. 104, 160, 161).

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES T. DUNCAN,
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PETITIONERS' REPLY BRIEF TO RESPONDENT'S OPPOSITION

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1027

ROBERT WAVERLY HICKS, ET AL.,
Petitioners

v.

PHYSICAL THERAPISTS EXAMINING BOARD FOR THE DISTRICT OF COLUMBIA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1027

ROBERT WAVERLY HICKS, ET AL.,
Petitioners

v.

PHYSICAL THERAPISTS EXAMINING BOARD
FOR THE DISTRICT OF COLUMBIA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

PREFATORY STATEMENT

By way of prefatory statement, the petitioners will briefly reply to the allegations in the respondent's counter-statement of the case.

The respondent alleges that petitioners testified in a "conclusory fashion" concerning their background and experience. By way of reference to the "Joint Appendix," the respondent attempts to minimize the prima facie case presented by petitioners by citing isolated instances rather than basing its case upon the entire record. Respondent further alleges that most of petitioners' testimony was "unrelated to physical therapy." This overlooks the fact that this training and experience is comparable to the prerequisite background educational requirements for an approved school of physical therapy.[1]

Respondent fails to accurately state the true facts displayed by the record concerning the petitioners' practice and number of patients treated.[2] Much of their testimony and evidence in this respect was arbitrarily excluded as not being in the two-year period.[3]

Respondent erroneously relies on the fact that petitioners were not employed at a hospital or nursing home. The record indicates that they made no claim to such employment.

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[1] In reference to footnote No. 2, p. 2, Respondent's Brief, records furnished to respondent by Petitioner Hicks, and still in its possession, show that he had been admitted to the George Washington University as a pre-medical student. (See Appendices I dated September 27, 1933 and II, dated 19th February, 1965, *infra*.) Further evidence of Petitioner Hicks' matriculation as a pre-medical student appears in the record concerning his thesis "Human Biochemistry and Physiology" turned in to Dr. Frank A. Hornaday upon completion in May, 1936, (JA 130-132). Appendix III explains the absence of evidence from Dr. Hornaday as a result of his untimely death.

[2] Petitioners Hicks, Schramm and Hlebanja testified at length to "ailments treated" and "techniques used" (Petition for a Writ of Certiorari, pp. 18-20). See testimony of James R. Morton, JA 164-169. And see Exhibit W, Affidavit of Etta Brodie, JA 58-62; Duryee affidavit, Exhibit V (JA 32-57, 106-109, 176-179 [R. 180-186]). Reserve Officer, U.S. Army, medical training, JA 106-107.

[3] Petition for a Writ of Certiorari, pp. 27-28.

They did testify and present evidence of hospital[4] and home calls as private practitioners of physical therapy upon medical doctors' orders.

Respondent misstates the record concerning members of the medical profession as references. Exhibit O (JA 27, 121) in the case of Robert W. Hicks and Exhibit B (JA 200, 209, 223) in the case of Leona E. Schramm, clearly show petitioners treated many patients referred by Robert W. Mance, M.D., for physical therapy treatments.

Respondent's conclusion that petitioners failed to prove that they had practiced physical therapy in the District of Columbia for two years immediately prior to the effective date of the Physical Therapists Practice Act was arbitrary and capricious and without foundation in the record. In addition to clear and unequivocal testimony by the petitioners, this was corroborated by the Board's "Work Sheets for Checking Applications" (JA 9, 196, 239). This is further substantiated by the respondent's inconsistent ruling that during this two-year period the applicants engaged in, at least, foot therapy, massage, steam baths, and colonic therapy, which by the medical profession's definitions are physical therapy (Petition for a Writ of Certiorari, pp. 17-18). Furthermore, the undisputed evidence showed that any and all treatments of patients by petitioners were under the supervision and prescription of medical doctors. This arbitrary conclusion is also disproved by the fact that all three petitioners, since 1960, were issued Professional Business Licenses designated as Physical Therapists by the Government of the District of Columbia.[5]

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[4]Sibley Memorial Hospital Nurses Notes, Exhibit X (JA 63-68, 123, 207-208, 253, 255-257, hospital and home calls, JA 120, 122, 152, 248-251, Clinical Laboratory: Johns Hopkins University Hospital, JA 111-112).

[5]Hicks JA 12); Schramm (JA 199), and Hlebanja (JA 242).

ARGUMENT

Petitioners Present Substantial Questions Warranting the Exercise of this Court's Jurisdiction To Review on Writ of Certiorari

Petitioners submit that there is ample grounds for review of this cause by Writ of Certiorari within the Rules of this Court. While the respondent contends the Physical Therapists Practice Act for the District of Columbia is a local issue, this argument overlooks the urgent need for the establishment of standards for administrative bodies. The matter of standards is an important question touching on the federal laws and of general application throughout the country.

In an attempt to maintain the position that this is a "local" issue, respondent cites six cases heretofore decided by this Court (Brief of Respondent, pp. 3-4). Five of these cases all dealt with a limited issue, the outcome of which would have no effect reaching beyond the boundaries of the District of Columbia. This is not the circumstance in the instant case. See *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965); *Miller v. United States*, 357 U.S. 301 (1958). The setting of adequate standards as guidelines to administrative agencies for the regulation of the public presents an issue of far reaching national importance. Review by this Court of cases national in scope is delineated in the case of *Del Vecchio v. Bowers*, 296 U.S. 280, 285 (1935).

The United States Court of Appeals for the District of Columbia Circuit Committed Numerous Egregious Errors When It Failed To Reverse Petitioners' Cases

Respondent contends that there is no showing by petitioners of egregious error. Such errors have been set out at length in the Petition for a Writ of Certiorari. The highlights of these issues will merely be touched on here to dramatize the egregious errors of the United States Court of Appeals for the District of Columbia Circuit.

The first error by which the petitioners feel aggrieved is the sanctioning by the United States Court of Appeals for the District of Columbia Circuit, hereinafter referred to as the "U.S. Court", of the use of a prejudicial standard exceeding the authority of the Board as a basis to evaluate their cases and thereby denying them licensure. The authority granted by Congress was to license "without examination", those physical therapists meeting requirements of age and character who were (1) graduates of an approved school, or (2) those who demonstrated "comparable training or experience", Section 9(1) and 9(2) of the Physical Therapists Practice Act [D.C. Code Ann. § 2-458, Supp. V, 1966].

The respondent adopted Appendix B[6] as a guise to define comparable training or experience. This prejudicial standard was utilized by the Board, on a line by line basis, to examine the petitioners (Petition for a Writ of Certiorari, pp. 14-16). This so-called standard "Appendix B" required training and experience far exceeding the intent and purpose of Congress without regard to due process of law. *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935).

The U.S. Court also committed egregious error in sanctioning extensive oral examination by the Board. This conduct was proscribed in the case of *Sherman v. Physical Therapists Examining Bd.*, 208 A.2d 728 (D.C.Ct.App. 1965).[7] The Board insisted on this course of conduct over the objection of Counsel. This examination was wrongfully conducted notwithstanding the fact that the petitioners had been precluded from taking the written examination in lieu of seeking licensure on Waiver Application (Petition for a Writ of Certiorari, Appendices N-1 and O-1).

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[6]"APPENDIX B, CRITERIA FOR MEETING REQUIREMENT OF PUBLIC LAW 87-280, SECTION 9, (2) 'RECEIVED COMPARABLE [TRAINING OR] . . . EXPERIENCE IN THE PRACTICE OF PHYSICAL THERAPY . . .'". (JA 91-102)

[7]Petition for a Writ of Certiorari, pp. 25-27.

Further error committed by the U.S. Court was the tacit approval of the arbitrary and capricious conduct of the Board, and the total disregard of the law of evidence. The latter is particularly emphasized by the so-called rebuttal of the petitioners' prima facie case on the testimony of only one witness, Hope H. McIntyre, the Executive Secretary to the Board.[8] This testimony amounted only to a reiteration of her administrative duties.

Additional error by the U.S. Court, as outlined in the case of Petitioner Hicks,[9] was the failure to recognize prejudicial error. This was the glossing over of the finding of fact by the Board that the petitioners were not graduates of approved schools.[10] This error was ignored even though the petitioners were seeking a license under a "grandfather clause" based on "comparable training or experience," and not on the basis or in the category of having been graduated from approved schools. The arbitrary and capricious rejection of all applicants by the Board who were not graduated from approved schools was affirmed by the Board's only witness.

The U.S. Court further erred in permitting the Board to taint the record in the case of Petitioner Hlebanja. This was the distorting of the record by the Chairman of the Board, by altering the record, without legal justification, and then certifying it as "a true and accurate account of the hearing".[11]

The U.S. Court continued to compound its errors and committed further wrong by failing to evaluate "comparable training or experience". The evidence showed that petitioners had extensive training and experience extending over a lengthy period; Petitioner Hicks - 20 years, Petitioner Schramm - 15 years, and Petitioner Hlebanja - 10 years. By

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[8]Footnote 35, pp. 24-25 - Petition for a Writ of Certiorari.

[9]Petitioner Hicks - Opinion of District of Columbia Court of Appeals, JA 188.

[10]JA 89-90, 202, 245.

[11]Petition for a Writ of Certiorari p. 31, (JA 253 and [R. 19]).

the failure of the U.S. Court to properly evaluate the standard set forth in the Act, it permitted the very thing which Congress had attempted to avoid, namely, not to legislate such experienced practitioners out of business. This Court, as early as 1910, in the case of *Watson v. Maryland*, 218 U.S. 173 (1910), recognized this principle. There it was stated:

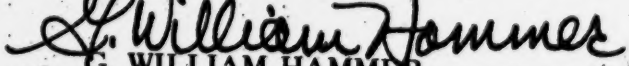
> Such exception proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts.

The totality of errors by U.S. Court was furthered by the injection into the case of a matter not in issue in the hearing before the Board, nor on appeal to the District of Columbia Court of Appeals. This was done by rationalizing the errors committed below by stating that nothing done by the Board nor the District of Columbia Court of Appeals was in contravention of the rights of the petitioners by virtue of Section 4 (e) of the Physical Therapists Practice Act [D.C. Code Ann. § 2-453 (e), Supp. V, 1966]. The U.S. Court then denied petitioners a rehearing *en banc* which asked that any rights they had under that Section 4 (e) be clarified. That Court further denied a motion on behalf of petitioners for further clarification of Section 4 (e) after denying the petition for rehearing. Had the U.S. Court not committed this error by speciously considering this issue, an opposite result could have been achieved in that Court. That this Section 4 (e) was not an issue in the case at the outset is manifested by the conduct of the Board in all out efforts which resulted in the closing of petitioners' private Physical Therapy Clinic and the threat of immediate criminal prosecution if they failed to comply.

CONCLUSION

The issues presented by this case are clearly beyond that of a local issue not extending beyond the boundaries of the District of Columbia. The case embodies the setting of standards that are national in scope as applied to administrative agencies and Federal Laws and represents a national issue of great magnitude. For the reasons presented, it also represents a denial of due process of law under the 5th and 14th Amendments to the Constitution of the United States. Because of this and the egregious errors committed by the United States Court of Appeals for the District of Columbia Circuit outlined above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



G. WILLIAM HAMMER

Suite 803, LaSalle Building
1028 Connecticut Avenue, N.W.
Washington, D.C.

Attorney for Petitioners

APPENDIX I

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, D. C.

OFFICE OF
THE DIRECTOR OF ADMISSIONS

September 27, 1933.

Mr. Robert W. Hicks,
1502 Vermont Avenue,
Washington, D.C.

My dear Mr. Hicks:

I am very glad to inform you that you are eligible for admission to the University. However, in view of your inability to get original certificates in the proper form from the Maury High School, in which school you have eight units, you are being admitted to the Junior College, General curriculum, instead of to the Junior College, Pre-Medical curriculum. You may take the courses prescribed for the Pre-Medical curriculum, however, and upon the completion of the first thirty semester hours of academic work with a C average, you may be transferred to the Pre-Medical course.

The Medical School has examined your credentials and is willing to recognize the following high school units for entrance. ***

Total. . . . . 15 Units

If you wish to enter the University this fall, it will be possible for you to register as late as October 3. However, it is to your advantage to get into your classes as soon as possible. I shall be glad to waive the five dollar late registration fee.

We shall be very glad to have you as one of our students.

Very sincerely yours,

H. G. Sutton
Director of Admissions

(s)wr

APPENDIX II

THE GEORGE WASHINGTON UNIVERSITY
SCHOOL OF MEDICINE
FROM THE OFFICE OF THE DEAN

THE GEORGE WASHINGTON UNIVERSITY
MEDICAL LIBRARY
1335 H STREET, N.W., WASHINGTON, D. C. 20005

19 February 1965

Physical Therapists Examining Board
Government of the District of Columbia
Department of Occupations and Professions
1145 19th Street, N.W.
Washington, D.C.

Dear Sir:

Mr. Robert W. Hicks, former undergraduate student, recently inquired at the Medical Library about a copy of a thesis he prepared entitled: "Human Biochemistry and Physiology", and in turn gave the requested copy in May 1936 to Dr. Frank A. Hornaday, his Academic Student Advisor, Executive Officer of the Department of Medicine.

Unfortunately at this late date, a search of the files (R111 .G35) of "Presented Prepared Papers" on research projects in the Medical Library does not include any papers prior to the year 1941 as now being available.

Sincerely yours,

Isabella Young
Medical Librarian

APPENDIX III

MEMORANDUM

THE MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA

TO: WASHINGTON, D. C.

FROM: DATE: 1/5/65

SUBJECT:

Dr. Frank Adelbert Hornaday
Died Feb. 10th 1951

Dora Caylor

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 29 1968
JOHN F. DAVIS, CLERK

PETITION FOR REHEARING

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1027

ROBERT WAVERLY HICKS, ET AL.,
Petitioners

v.

PHYSICAL THERAPISTS EXAMINING BOARD
FOR THE DISTRICT OF COLUMBIA
Respondent

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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1028 Connecticut Avenue, N.W.
Washington, D.C.
Attorney for Petitioners

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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Watson v. Maryland, 218 U.S. 173 (1910) 3

STATUTES

Constitution of the United States:

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Fourteenth Amendment 2, 4

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Section 4(e) 2
Section 9(2) 3

Physical Therapists Practice Act, D.C. Code Annotated (Supp. V, 1966), Sec. 2-451 - 2-472:

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PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Robert Waverly Hicks, Leona E. Schramm and Cecilia M. Hlebanja, respectfully request that this Court grant a Rehearing of its Order of March 18, 1968 denying their Petition for a Writ of Certiorari and that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit in the above styled case as prayed for in the petition filed on January 16, 1968.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT OF CERTIORARI

Petitioners state that in timely fashion they commenced preparation of a reply brief pursuant to Rule 24 (4) immediately following the filing of respondent's brief in opposition to the petition. As promptly as received from the printer, the same was delivered to the Court. The petitioners' reply brief to respondent's opposition was filed with the Clerk at 10:35 A.M. on Friday, March 15, 1968. At that time the petitioners were informed that the Court was already in conference. This reply brief, although docketed immediately, may have arrived too late for consideration by the Court before its decision to deny the Writ of Certiorari.

On the assumption that the reply brief, which fully answers all of respondent's arguments, arrived too late and that the Court has not had the opportunity to consider petitioners' reply brief in conjunction with the other grounds for a Writ of Certiorari, petitioners urge that the Court should grant a rehearing in this cause and consider the serious and erroneous decision of the court below. The issues raised in the Petition for a Writ of Certiorari and the reply brief are more than a local issue confined to the boundaries of the District of Columbia. The issue of standards as guidelines for the control of Administrative Boards and Agencies have far reaching implications on a national scale.

Petitioners contend that they have been denied due process of law under the 5th and 14th Amendments of the Constitution. The United States Court of Appeals for the District of Columbia Circuit totally lost sight of the law in condoning the totality of errors in prior proceedings and injecting the element of Section 4(e) of the Physical Therapists Practice Act [D.C. Code Ann. § 2-453(e), Supp. V, 1966], into the cases. The instances where that Court lost sight of the law were the tainting of the record by the Chairman of the Board without legal justification, the overlooking of the multiplicity of arbitrary and capricious acts of the Board, the ignoring of the Board's threat of criminal prosecution

of the petitioners, the compounding of the errors by the District of Columbia Court of Appeals when it failed to reverse for prejudicial error,[1] and in the sanctioning of the adoption of Appendix B[2] and the permissive use of the same in conjunction with an oral examination of petitioners.[3]

Petitioners have devoted many years to the practice of physical therapy, Petitioner Hicks - 20 years, Petitioner Schramm - 15 years, and Petitioner Hlebanja - 10 years. They will be unconstitutionally deprived of these many years of diversified experience if not permitted to continue in their chosen profession, as well as, a loss in a building in which petitioners have a financial interest. When Congress enacted the Physical Therapists Practice Act, Section 9(2) [D.C. Code Ann. § 2-458, Supp. V. 1966] with a "grandfathers clause," it was not their intent and purpose to legislate those practitioners out of business who have acceptably engaged in the profession for a number of years, *Watson v. Maryland*, 218 U.S. 173 (1910). That petitioners have met the standards of the *Watson* case is manifested by their years of experience, in the issuance by the Government of the District of Columbia of Professional Business Licenses, since 1960 designating the petitioners as Physical Therapists, the public protection through Professional Medical Malpractice Insurance carried by them and the operation of a highly specialized Physical Therapy Clinic treating patients only upon the prescriptions from medical doctors.

For the reason stated in the Petition for a Writ of Certiorari and in the petitioners' reply brief, and in order to urge the Court to take a second look at the far reaching issues involved, the petitioners file this Petition for Rehearing.

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[1] Petitioner Hicks - Opinion of District of Columbia Court of Appeals, JA 188.

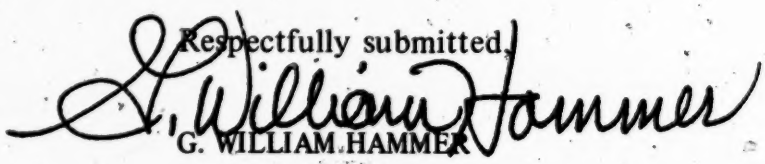
[2] "APPENDIX B, CRITERIA FOR MEETING REQUIREMENT OF PUBLIC LAW 87-280, SECTION 9, (2) 'RECEIVED COMPARABLE [TRAINING OR] . . . EXPERIENCE IN THE PRACTICE OF PHYSICAL THERAPY . . .'". (JA 91-102)

[3] This conduct by the Board was proscribed in *Sherman v. Physical Therapists Examining Bd.*, 208 A.2d 728 (D.C.Ct.App. 1965).

CONCLUSION

Because of the denial of due process of law under the 5th and 14th Amendments to the Constitution of the United States, for the reasons set forth here, in the Petition for a Writ of Certiorari, and in the brief in reply to respondent's opposition, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit as prayed for.

Respectfully submitted,



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1028 Connecticut Avenue, N. W.
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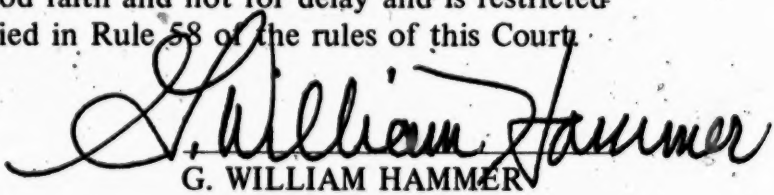
Attorney for Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.



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